87-1717

Supreme Court, U.S.
FILED
APR 18 1988
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FELIPE BONILLA ROMERO, a/k/a FELO BONILLA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Questions Presented

Whether the dual sovereignty exception to the double jeopardy clause of the fifth amendment of the United States Constitution, enunciated in *Abbate v. United States*, 359 US 187 (1959) applies where simultaneous Puerto Rico and Federal prosecutions are instituted against a defendant for similar offenses arising out of the same course of conduct? Stated another way:

Whether Puerto Rico is to be treated as a separate sovereign instead of a Territory of the United States subject to the plenary powers of Congress under article IV, §3 of the United States Constitution for double jeopardy purposes.

Whether jeopardy attaches after dismissal of a criminal prosecution following a pretrial evidentiary hearing resulting in the suppression of the evidence indispensable for conviction, where procedural rules require that motions to suppress evidence be held prior to trial.

Where a State court has granted a motion to suppress evidence upon a finding that the State search warrant authorizing the search of the defendant's house was obtained upon perjurious statements of State police officers which induced the court to issue the warrant, is a Federal court bound by the State court's order of suppression in a subsequent federal prosecution against the same defendant for an offense arising out of the same course of conduct or must a hearing *de novo* be held under *Elkins v. United States*, 364 US 206 (1960)?

Whether in Puerto Rico—Federal sequential prosecutions against a defendant for similar offenses arising out of the same course of conduct, the Federal Government is collaterally estopped under the double jeopardy and/or due process clauses of the fifth amendment, United States Constitution, from relitigating issues of fact previously adjudicated in an order of a Puerto Rico court rendered after a pretrial evidentiary hearing on the defendant's pretrial motion to suppress.

Whether Federal and Puerto Rico prosecutorial agencies, both creatures of Congress, authorized to prosecute a defendant for

similar offenses arising out of the same transaction, are in privity for collateral estoppel purposes.

Whether the United States District Court of Puerto Rico and the Superior Court of Puerto Rico, *nisi prius* courts established by Congress under its article IV, §3, territorial powers, are courts of coordinate jurisdiction of the same sovereign with separate jurisdictional authority.

Whether in Puerto Rico – Federal sequential prosecutions against a defendant for similar offenses arising out of the same course of conduct, it is an impermissible abuse of discretion for the Federal court to hold a hearing *de novo* on the issue of suppression of evidence without requiring a showing by the Government of any exceptional circumstances requiring a reconsideration of the Puerto Rico court's decision on the same issue.

Whether the Petitioner's constitutional rights to a fair trial were violated by the District Court during the hearing on Petitioner's motion to suppress when the Court (1) without good cause denied Petitioner's application for an overnight continuance to produce available witnesses essential to his defense although the Court had advised defense counsel that he would allot a week, if necessary, to the trial of the hearing, and the application was made after 3:30 in the afternoon of the first day of the hearing (2) denied the Petitioner a continuance of the proceedings for the purpose of obtaining the transcript of the prior testimony of police officer witnesses for impeachment purposes and (3) shifted the burden of going forward to the Petitioner.

Whether the possession of cocaine and heroin inside of one brown paper bag at the same time and place constitutes only one offense for which only single punishment may be imposed.

Whether the imposition of maximum jail sentences as to all counts for which the Petitioner was convicted and ordering the sentences on two counts arising from simultaneous possession of cocaine and heroin to run consecutively, constituted cruel and inhuman punishment violating the eighth amendment of the United States Constitution.

Whether the District Court erred in denying Petitioner's motion to suppress evidence seized from the petitioner by Puerto Rico police officers as a result of a warrantless search of his car and of his person on September 18, 1985 and during a search of his home on September 19, 1985 upon the authority of a search warrant obtained upon perjurious statements and tainted evidence.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

TO THE HONORABLE JUDGES OF THE UNITED STATES SUPREME COURT:

Petitioner, FELIPE BONILLA ROMERO, hereinafter "Petitioner" or "Bonilla", through his undersigned attorney, respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the First Circuit entered December 30, 1987, affirming the Judgment of Conviction entered in the District Court for the District of Puerto Rico on December 29, 1986.

Opinions Below

The Petitioner was found guilty after a bench trial in the United States District Court for the District of Puerto Rico, Juan Perez-Gimenez (CJ). The judgment of conviction was entered on December 29, 1986. The Opinion and Order of the District Court denying Petitioner's pretrial motion for the suppression of evidence (Appendix, infra, p. A-1) is reported in 639 F. Supp. 1021 (D. Puerto Rico). The Opinion of the Court of Appeals below affirming the judgment of conviction in the District Court (Appendix, infra, p. A-12) is reported in 836 F.2d 39 (1st Cir 1987).

Jurisdiction

The Judgment of the Court of Appeals below (Appendix, infra, P. A-12) was entered on December 30, 1987. A petition for rehearing was timely filed. The Court of Appeals below denied a rehearing by its order entered on February 17, 1988 (Appendix, infra, p. A-26). The jurisdiction of this Court is invoked under 28 USC 1254 (1).

Constitutional Provision and Statutes Involved

1. Article IV, §3, cl.2 and Amendments IV, V, VI and VIII of the United States Constitution. The complete text or pertinent parts thereof are set forth in Appendix, infra, p. A-27.

2. The following Sections of the Federal Controlled Substances Act, Title 21 USC Chapter 13:21 USC §802; 21 USC §812; 21 USC §841 (a)(b) 1(A)(B), (2)(3)(4)(5)(6), (c). The complete text or pertinent parts thereof are set forth in Appendix, infra, p. A-28—A-34.

3. Pub. L. 600, 64 Stat 320 (1950). The complete text thereof is set forth in Appendix, infra, pp. A-34—A-36.

4. The following Sections of the Controlled Substances Act of Puerto Rico: Title 24 LPR §2102; Title 24 LPR §2202; Title 24 LPR §2401. The complete text or pertinent parts thereof are set forth in Appendix, infra, pp. A-36—A-40.

Statement of the Case

This case involves separate federal and Puerto Rico prosecutions against the Petitioner, a United States citizen residing in the Municipality of Ponce, Puerto Rico, for violations of similar federal and Puerto Rico criminal statutes arising from the same transactions on September 18th and 19, 1985.

On September 18, 1985 at approximately 1:30 p.m. while the Petitioner was stopped at a gas station fueling and servicing his car, he was arrested at gunpoint by four Puerto Rico police officers. At the scene of the arrest the officers seized two glassine envelopes containing small amounts of heroin and cocaine from the Petitioner's pockets and from inside the car, a man's leather handbag in which was concealed a Beretta pistol.

The Government claimed that the warrantless intrusion was reasonable since the Petitioner had been observed entering his car with a pistol in open view a short time before the arrest by a police officer who radioed the information to the arresting officers.

The Petitioner was arraigned on weapons and drug charges under Puerto Rico law and released on bail. The following day, September 19, 1985, a warrant for the search of Bonilla's home was issued by a Judge of the District Court of Puerto Rico upon the affidavits of two of the officers who had participated in the investigation and arrest of the Petitioner the day before.

During the search of the Petitioner's home pursuant to that warrant, a brown bag was seized from a couch in the living room. Contained in that bag were a Colt pistol and several plastic bags containing heroin and cocaine. The net aggregate weight of the cocaine was 136.87 grams and the net aggregate weight of the heroin was 74.76 grams.

The Petitioner was again arrested on additional weapons and drug charges under the Puerto Rico law and released on bail after arraignment.

On February 19, 1986, five months after the Puerto Rico prosecution had commenced, the United States obtained an

indictment in the Federal District Court of Puerto Rico charging the Petitioner with federal offenses similar to and arising from the same transactions as the offenses for which he was being prosecuted in the Puerto Rico Court. The Petitioner was arraigned on the federal charges and was held pursuant to an order of detention pending trial.

The federal indictment contained five counts. The first count charged possession with intent to distribute the cocaine that was seized from the Petitioner's home in a brown bag on September 19, 1985 in violation of 21 USC §841(a)(1); the second count charged possession with intent to distribute the heroin that was seized from the Petitioner's home on September 19, 1985 in the same bag in violation of 21 USC §841(a)(1); counts three and five charged the Petitioner with receiving firearms which had been shipped in interstate commerce after having been convicted of a crime punishable by imprisonment for a term exceeding one year in violation of 18 USC §922(h)(1). The third count encompassed the Beretta pistol seized from the Petitioner on September 18th and the fifth count the Colt pistol seized from the Petitioner's home in the brown paper bag on September 19th. The fourth count was dismissed and is not at issue here.

The events leading up to the warrantless arrest and search of the Petitioner on September 18, 1985 and to the obtaining and the execution of the search warrant for his home on September 19, 1985 as alleged by the witnesses offered by both the Puerto Rico and federal prosecutors are substantially as follows:

On September 18, 1985, Officer Cain Santiago of the Puerto Rico Police Drug Division, City of Ponce, was assigned to conduct surreptitious surveillance for the purpose of obtaining evidence to support an application for a search warrant for the Petitioner's home. He commenced the surveillance at 8:30 a.m. from inside the rear compartment of a van parked near the Petitioner's home which was equipped with one-way view rear windows.

At 9:30 a.m. Santiago observed a Champ automobile arrive at the area in front of the Petitioner's home. The driver got out, went inside the Petitioner's home and emerged five minutes later

holding a plastic bag containing a white substance in his hand. Santiago was able to observe the plastic bag and its contents because the individual held it up to the sunlight to examine it in open view.

At 10:30 a.m. another car arrived, a white Mitsubishi, license plate 12C265. The driver of this car went to the front gate of the Petitioner's home and called out to him. The Petitioner came out, and in open view, gave the driver a plastic bag containing a white substance in exchange for money. Santiago then radioed-in for a check of the license plate of the Mitsubishi and was advised that the car had been reported stolen.

Without requesting authorization, Santiago then abandoned his assignment and drove the van back to Headquarters, allegedly to report to his superior, Sgt. Pedro L. Arevalo, the sighting of a stolen vehicle.

During the suppression hearing in the federal court, Santiago testified that he returned to the Drug Division at 11:30 a.m. That present at the Drug Division was Sgt. Arevalo and Agent Angel L. Negron. That he reported the sighting of the stolen automobile and his observation of two "drug related" transactions at the Petitioner's residence to Sgt.Arevalo who then instructed him to return to his post and continue the surveillance.

During the suppression hearing before the Puerto Rico Judge, Santiago first stated that he returned at 10:45 a.m. but upon being confronted with his affidavit of September 19, 1985, changed the time of his arrival to 11:20 a.m. Agent Negron testified that Santiago arrived at 10:45 a.m. and Sgt. Arevalo testified that Santiago arrived at 9:30 or 9:45 a.m.

Sgt. Arevalo also testified that Santiago had informed him of *only one* drug related transaction at Bonilla's home that morning and it was for that reason that he told him to return and continue the surveillance.

To avoid compromising the surreptitious surveillance, it is claimed that on the return trip to the Bonilla residence Santiago was driven by Agent Negron who parked the van near the front of the Petitioner's home and left on foot, leaving Santiago secreted

in the rear compartment of the van. It is submitted that it was highly improbable that Agent Negron would have been assigned a role which necessarily exposed him to view in front of the Petitioner's home since Negron testified that the Petitioner had known him for the past six years.

At approximately 1:35 p.m. Santiago claims to have observed the Petitioner exit his house carrying a pistol on the left side of his waist in open view, enter a black Trans AM, and drive away. Santiago followed the Petitioner in his van to observe his direction of travel and radioed Agent Negron to relate what he had observed although he could not know precisely where Negron was at that time nor whether Negron had access to a radio.

As fate would have it, at the time of the call, Agent Negron was in another police vehicle with three other agents of the Ponce Drug Division allegedly searching for a stolen car and conveniently located not far from the gas station where the Petitioner was arrested. Santiago communicated to Negron his observations of the Petitioner in possession of a pistol and told Negron to arrest him.

Present at the gas station at the time of the arrest was the attendant, Fernando Martinez. Mr. Martinez testified during the Puerto Rico hearing that Cain Santiago was one of the officers who arrested the Petitioner at the gas station.

On the following day, September 19,1985, a warrant for the search of the Petitioner was issued by a Judge of the District Court of Puerto Rico, Ponce Term, upon the sworn affidavits of Officers Cain Santiago and Angel L. Negron.

The affidavit of Santiago related the details of two "drug-related" transactions which he claimed to have observed while conducting surveillance in front of the Petitioner's home and his obsevation of the Petitioner carrying a pistol in open view, but did not indicate the date of those observations. The affidavit of Agent Negron related the facts concerning the arrest of Bonilla at the gas station and the events leading up to that arrest – which included his driving Santiago back to continue the surveillance

at approximately 12:30 p.m. on September 18, 1985, and receiving Santiago's radio communication concerning Bonilla's possession of a pistol at approximately 1:40 p.m.

Acting under the authority of that search warrant, several officers of the Ponce Drug Division, including Santiago and Negron, searched the home of the Petitioner on September 19, 1985.

The Motions To Suppress In the Superior Court of Puerto Rico

The Petitioner filed two motions to suppress evidence in the Superior Court of Puerto Rico: (a) to suppress the evidence seized as a result of the warrantless search on September 18, 1985 and (b) to controvert the warrant to search his home issued by the Superior Court on September 19, 1985 and suppress the evidence seized pursuant to the execution of that warrant.

In support of the first motion, the Petitioner claimed that the facts alleged by the police officers to justify his arrest at the gas station on September 18, 1985 were false. Accordingly, there was no probable cause for his arrest and the subsequent search was illegal. In support of the second motion, he contended that the sworn statements of Cain Santiago which served as the basis for the issuance of the warrant were false, and further, that since the date of the "drug-related" acts, offered to support the probable cause to believe that there were controlled substances present in his home on September 19, 1985, was not indicated, the warrant was null and void.

On April 24, 25 and 29, 1986, an evidentiary hearing was held before the Hon. Arnaldo Lopez Rodriguez in the Superior Court of Puerto Rico, Ponce Term, on Bonilla's motions to suppress.

At the conclusion of the Hearing, during which the judge heard the testimony of thirteen witnesses and received various pieces of documentary evidence, the Court announced that it was going to prepare an extensive written Decision and Order granting the Petitioner's motions for the suppression of evidence, based primarily upon his finding that false statements had been utilized by the police officers to establish probable cause.

On May 13, 1986, Judge Lopez Rodriguez issued a Decision and Order controverting the search warrant and suppressing the evidence seized from the Petitioner on September 18 and 19, 1985. The Court held that it could not credit the sworn statements of Officer Santiago alleging the observation of the two "drug-related" transactions at the Bonilla residence and of the Petitioner exiting his home in possession of a pistol in open view. As such, he found that there was no probable cause for the arrest and warrantless search of the Petitioner on September 18 and for the issuance of the search warrant on September 19, 1985.

In his decision Judge Lopez-Rodriguez set forth nine separate illustrations of the mendacious, contradictory, stereotyped and unreal police officer testimony that led him to his reasoned opinion and cited the following language from *El Pueblo v. Luciano*, 83 D.P.R. 573 (1961):

> "We judges should not, after all, be so naive as to believe statements which no one else would believe."

The Court dismissed the prosecution against the Petitioner without prejudice to the Prosecutor's right to reopen upon notification to the Court, within thirty days, that there was additional evidence to sustain the charges independent of the evidence suppressed.

No additional evidence was offered by the Prosecutor during the thirty-day period granted by the Court.

On or about July 18, 1986 the prosecutor filed a Petition for Certiorari in the Supreme Court of Puerto Rico seeking review of the Order issued by Judge Lopez Rodriguez on May 13, 1986. That Petition was denied on December 10, 1987 upon the grounds that there was no cause to disturb the trial court's finding on credibility in the absence of passion, bias, partiality or plain error.

The Proceeding in the Federal District Court

The federal indictment was obtained with the full cooperation of Puerto Rico law enforcement agencies who provided the necessary witnesses, the search warrant, the physical evidence and the laboratory reports.

On April 29, 1986, the date when the suppression hearing in the Puerto Rico prosecution was concluded, the federal indictment was set down for Trial on May 12, 1986.

On May 6, 1986 the Petitioner filed a motion for the suppression of evidence and continuance of the Trial alleging among other grounds that the federal court was bound by the Decision and Order of the Puerto Rico Court suppressing the evidence and dismissing the prosecution against Bonilla.

On May 12, 1986 the Petitioner renewed those arguments and requested a continuance of the proceedings until the Puerto Rico judge filed his Decision and Order and until the transcript of the police officers' testimony, given during the suppression hearing held in the Superior Court, could be available to defense counsel for impeachment purposes.

Petitioner's motion for a continuance was denied and the district court, relying on Elkins v. United States, *supra*, ruled that a hearing *de novo* on the Petitioner's motion for suppression of evidence in the federal court was required.

On May 13, 1986 the evidentiary hearing on Petitioner's motion to suppress was commenced. Although part of the evidence which the Government intended to introduce during trial had been seized as a result of the warrantless search of the Petitioner's car on September 18, 1985, and that same evidence was used by Puerto Rico police officers in support of their application for the search warrant the next day, the Court, over the Petitioner's objection decided that the defense had the burden of going forward during the hearing.

Defense counsel called Officers Cain Santiago and Angel L. Negron and when their testimony was concluded, at approximately 3:30 in the afternoon, he requested a continuance until the following morning to produce Sgt. Pedro L. Arevalo and several rebuttal witnesses.

Although the Court had indicated to counsel that it would allot "a week if necessary" to try the motion to suppress, it denied the defense application for an overnight continuance to call witnesses whose testimony had resulted in the finding by the Puerto Rico Judge that Officer Santiago had made false statements to support probable cause in his affidavit of September 19, 1985.[1]

After 3:30 p.m. defense counsel called attorney Miguel Cochran and the Petitioner, consuming the balance of the day.

The Government offered no witnesses or any proof that had not been previously submitted to the judge during the Suppression Hearing held in the Puerto Rico prosecution.

Crediting the testimony of police officers who had been found unworthy of belief by the Puerto Rico judge two weeks before – one of which has a history of mendacity[2] – and after considering the Decision and Order of the Puerto Rico judge, which was introduced into evidence, the District Court denied the Petitioner's motion to suppress the evidence.

While the district court judge had the Petitioner's pretrial motions under advisement, additional motions were filed by the defense claiming *inter alia* that (1) counts one and two of the indictment should be consolidated upon the grounds that simultaneous possession of heroin and cocaine constituted only one violation of the same statute; (2) that the Government was collaterally estopped from relitigating in the federal court the issues of fact adjudicated by the Puerto Rico Court in its order suppressing the evidence, and (3) that the federal district court could not reconsider the ruling of the Puerto Rico Superior Court, a

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[1] Ironically, the Court in its order denying Petitioner's motion to suppress stated, "*no showing has been made to this Court in the sense that false statements were included in the Affidavit.*" (Emphasis added) (Appendix, infra, p. A-11)

[2] Agent Angel Negron admitted during his testimony before the federal court that he had been found unworthy of belief by a Puerto Rico Superior Court judge in a proceeding held in 1983.

court of coordinate jurisdiction of the same political sovereign, on the issue of suppression of evidence as a matter course.

On December 15, 1986 the Petitioner waived his rights to a jury trial and a bench trial was held upon stipulated evidence. The court found the Petitioner guilty under Counts One, Two, Three and Five of the Indictment.

On December 29, 1986, the Petitioner was sentenced as follows: As to Counts One and Two, a term of imprisonment of fifteen years and a fine of $50,000.00 as to each Count, the terms of imprisonment to be served consecutively. As to Counts Three and Five, a term of imprisonment of five years as to each Count, said terms of imprisonment to be served concurrently with each other and with the terms imposed in Counts One and Two. A special parole term of five years was also imposed as to Count One.

On December 30, 1987 the Court of Appeals for the First Circuit affirmed the judgment of conviction and on February 17, 1988 denied a Petition for Rehearing.

Reasons for Granting the Writ

In Affirming the Judgment of the District Court, the Court of Appeals Decided Federal Questions in a Way that Conflicts with Applicable Decisions of this Court and Important Questions of Federal Law Which Have Not Been, but Should Be Settled, by This Court.

1. The Petitioner's Rights Under the Double Jeopardy and Due Process Clauses of the Fifth Amendment to the United States Constitution Were Violated When He Was Subjected to Successive Puerto Rico-Federal Prosecutions for Similar Offenses Arising from the Same Transaction.

The federal prosecution should have been barred on double jeopardy grounds as to the same offenses[3] charged in the Puerto

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[3] The Puerto Rico Controlled Substances Act (Appendix, Infra, pp. A-36-A-40) and the Federal Controlled Substances Act (Appendix, Infra, pp. A-28-A-34) are virtually identical. It being the policy of the Government of Puerto Rico to conform its laws in this area to the Federal Law. *People v. Rivera*, 98 P.R.P. 159, 162.

Rico prosecution. Alternatively, the Government should have been estopped from relitigating the issue of admissibility of evidence adjudicated in favor of the Petitioner in the Puerto Rico court on either double jeopardy or due process collateral estoppel principles. Additionally, apart from collateral estoppel protection available to the Petitioner it was an impermissible abuse of discretion for the federal court to reconsider the issue of admissibility of evidence previously decided by the Puerto Rico Court, a court of coordinate jurisdiction, as a matter of course.

The Petitioner's contention that the federal prosecution was barred by the double jeopardy clause is based upon the following premises: (1) that jeopardy attached as a result of the dismissal of the Puerto Rico prosecution after a pretrial evidentiary hearing resulting in the suppression of the indispensable evidence and (2) that the status of Puerto Rico as an unincorporated territory or possession of the United States subject to the plenary powers of the Congress under Article IV, §3, clause 2 of the United State Constitution did not change with the passage of Pub. L. 600, 64 Stat. 320 in 1950 to the extent that Puerto Rico may be treated as a State for double jeopardy purposes and its courts and prosecutors as governmental agencies deriving their authority to prosecute the Petitioner from sources other than the Congress of the United States exercising its Article IV, §3 powers.

If the Petitioner's contention that jeopardy attached is rejected, but the second premise aforementioned is upheld, then due process-collateral estoppel protection should have been available to the Petitioner and even if privity were lacking, the federal district court had no authority to review the order of suppression of evidence of the Puerto Rico Court, a court of coordinate jurisdiction, without a showing of extraordinary circumstances.

(A) *Double Jeopardy*

The Fifth Amendment does not pinpoint precisely when a defendant's right under the double jeopardy clause attaches. It has been judicially determined that jeopardy attaches after the trial commences, after a plea of guilty before the commencement of trial (*United States v. Hecht*, 638 F.2d 651 [3rd Cir. 1981])

and after dismissal of a prosecution by the court for insufficiency of evidence during the trial. *Smalis v. Pennsylvania*, 106 S.Ct. 1745 (1986).

It is submitted that the dismissal of the Puerto Rico prosecution against the Petitioner here was the functional equivalent of a dismissal for insufficiency of evidence during a bench trial as in *Smalis v. Pennsylvania, supra*, and jeopardy attached.

The trial never commenced in the Puerto Rico prosecution. After a contested pretrial hearing that consumed three days during which thirteen witnesses testified, the court granted the motion to suppress the indispensable evidence and subsequently dismissed the prosecution. That ruling constituted a final judgment of acquittal and is to be distinguished from a dismissal of an indictment prior to trial and from the dismissal of a prosecution after a preliminary hearing for lack of probable cause. In this prosecution, the Petitioner was charged with possessory crimes. The admissibility of the evidence seized was determinative of guilt or innocence for all practical purposes. Clearly, the Petitioner was at "risk of conviction" and subject to all the hazards of trial at the time of the commencement of the pretrial suppression hearing.

The constitutional prohibition against double jeopardy protects the individual from being subjected to the hazards and ordeals of trial more than once for the same offense.

In *Green v. United States*, 355 U.S. 184 (1957) this Court said at p. 187:

". . . the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity."

The hazards of trial prohibited by the double jeopardy clause were as real to the Petitioner in this case, in which the prosecution was terminated for lack of evidence after a pretrial suppression hearing, as to a defendant whose prosecution is terminated for lack of evidence during a bench trial.

If the objection to the introduction of the evidence in the case at bar could have been made after the trial commenced with the same results, jeopardy would have attached under Smalis, *supra*.

There is no rational distinction for double jeopardy purposes between a dismissal of the prosecution after a pretrial hearing resulting in the exclusion of the indispensable evidence, and a dismissal during trial after a successful objection to the introduction of the same evidence. A rule that requires the denial of constitutional double jeopardy protection to a defendant under the former dismissal but not under the latter clearly produces a bizarre result. See, *United States Ex Rel., Di Giangiemo v. Regan*, 528 F.2d 1262, 1266 (2nd Cir. 1975).

The procedural requirement that motions to suppress evidence be brought before trial albeit an important rule in the interest of orderly procedure and expediency, must be reconciled with the need to protect fundamental rights guaranteed to a defendant under the Constitution of the United States.

"A rule of practice must not be allowed for any technical reason to prevail over a constitutional right." *Gouled v. United States*, 255 U.S. 298, 313 (1921).

The conflicting interests should be resolved in favor of the constitutionally protected rights of the Petitioner by a finding that jeopardy attached upon the dismissal of the Puerto Rico prosecution.

(B) *Due Process-Collateral Estoppel; the Authority Of The Federal District Court To Review Decisions Of The Superior Court of Puerto Rico; and the Applicability Of The Dual Sovereignty Exception To The Due Process Clause Of The Fifth Amendment Of The United States Constitution In Puerto Rico-Federal Sequential Prosecutions.*

It is now well settled that independent of double jeopardy concerns the doctrine of collateral estoppel is applicable in successive criminal prosecutions. See, *United States v. Di Giangiemo v. Regan, supra*, and *United States v. Evans*, 655 F.Supp. 243 (E.D. La.1987).

Acknowledging the merits of Judge Friendly's argument in Di Giangiemo, *supra*, that in criminal proceedings collateral estoppel is required by due process regardless of whether jeopardy has attached, the court of appeals nevertheless declined to decide such an important constitutional question upon the grounds that the federal prosecutors were neither a party to nor in privity with a party to the Puerto Rico suppression hearing.

Noting that in *United States v. Lopez-Andino*, 831 F.2d 1164, the First Circuit had held that Puerto Rico was a separate sovereign for double jeopardy purposes, the court of appeals stated that even if jeopardy attached the dual sovereignty exception to the double jeopardy clause would have been applicable.

The court of appeals disregarded the Petitioner's contention that the Federal District Court and the Superior Court of Puerto Rico are nisi prius courts of the same sovereign and that as courts of coordinate jurisdiction, apart from double jeopardy and collateral estoppel considerations, the federal tribunal abused its discretion in permitting the Government to relitigate the motion to suppress evidence which had been previously heard and determined by the Puerto Rico Court without requiring any showing from the Government to justify a new hearing.

In reaching its conclusion that the element of privity was lacking, the court below did not find it necessary to consider Puerto Rico's sovereignty status as a United States territory. The same reasoning must have been the basis for completely disregarding the Petitioner's contention that the federal district court and the Puerto Rico Superior Court are courts of coordinate jurisdiction of the same political sovereign. Notwithstanding the court's insistence that the issue of status was not considered, it is clear that the court's holding is in keeping with the majority opinion in *United States v. Lopez-Andino, supra,* (Puerto Rico is a State of the Union for double jeopardy purposes) and other First Circuit opinions treating Puerto Rico as a State as a result of the passage of Public Law 600. See, *Mora v. Mejias*, 206 F.2d 377 (1st Cir. 1953) (Puerto Rico is a State within the meaning of 28 U.S.C. §2281); *Figueroa v. People of Puerto Rico*, 232 F.2d 615 (1st Cir. 1956) (Constitution of Puerto Rico authorized by Congress under Public Law 600 not a federal law); *United States v. Quinones*,

758 F.2d 40, 42 (1st Cir. 1985) (Puerto Rico ceased being a territory in 1952).

It is respectfully submitted that the aforesaid decisions constitute impermissible encroachments by the court upon power strictly within the realm of the body politic, the Congress, which may also be categorized as an attempt at the piecemeal granting of statehood to the unincorporated territory of Puerto Rico by judicial fiat.

The decision below will have a major detrimental impact upon the administration of the Criminal Justice System of Puerto Rico for its effect will be to seriously limit the inherent power of the courts of the Commonwealth of Puerto Rico to supervise local law enforcement officers as required to protect the constitutional right of privacy of United States citizens residing in Puerto Rico and to severely undermine the integrity and prestige of the judges of the courts of Puerto Rico in the eyes of law enforcement officers and the community in general.

Puerto Rico is an unincorporated territory belonging to the United States and the authority for Puerto Rico and the Federal Government to institute the simultaneous prosecutions against the defendant emanates from the same source, the Congress of the United States acting under Article IV, §3 of the United States Constitution. As such, neither the dual sovereignty exception to the double jeopardy clause permitting sequential state-federal prosecutions for the same acts nor the rule in *Elkins v. United States, supra* (hereinafter, *Elkins*), requiring a hearing de novo on motions to suppress evidence in state-federal sequential prosecutions apply.

In applying the Dual Sovereignty Doctrine the crucial determination is whether the two jurisdictions that seek to successively or simultaneously prosecute a defendant for the same course of conduct are separate sovereigns. That determination depends on whether the two jurisdictions draw their authority to prosecute and punish the offender from distinct sources of power. *Heath v. Alabama*, 106 S.Ct. 433 (1985); *United States v. Wheeler*, 435 U.S. 313 (1978).

Where the authority of both jurisdictions to prosecute springs from the same source, or where the power of one of the jurisdictions has been delegated to it by a parent jurisdiction, the Dual Sovereignty Doctrine is not applicable. *Waller v. Florida*, 397 U.S. 387 (1970); *Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937); *Grafton v. United States*, 206 U.S. 333 (1906).

In enacting Pub. L. 600, 64 Stat 320, July 3, 1950 (Appendix, infra, p. A-34), Congress clearly intended to engage in an exercise of its territorial powers over Puerto Rico, and not in a permanent abdication of such powers.

The House Report recommending passage of Pub. L. 600 contains the following language:

> "The bill under consideration would not change Puerto Rico's fundamental political, social, and economic relationship to the United States. Those sections of the Organic Act of Puerto Rico pertaining to the political, social, and economic relationship of the United States and Puerto Rico concerning such matter as the applicability of United States laws, customs, internal revenue, *Federal judicial jurisdiction* in Puerto Rico, Puerto Rican representation by a Resident Commissioner, etc., would remain in force and effect, and upon enactment of §3336 would be referred to as the Puerto Rican Federal Relations Act. The sections of the Organic Act which section 5 of the bill would repeal are the provisions of the act concerned primarily with the organization of the local executive, legislative and judicial branches of the government of Puerto Rico and other matters of purely local concern . . . H.R. Rep. No. 2275, 81st Cong., 2d. Sess. 3 (1950); U.S. Code Cong. Adm. News Service, 81st Cong., 2d Sess. 2682.

If Puerto Rico remained a territory of the United States subject to the plenary power of the Congress under U.S. Const. Article IV, §3, after the passage of Public Law 600 in 1952, as this Court clearly held in *Califano v. Torres*, 435 U.S. 1 and *Harris v. Rosario*, 446 U.S. 651 (1980), (See also, Concurring Opinion in *United States v. Lopez-Andino*, *supra*), then under *Grafton v. United States*, *supra*, *Puerto Rico v. Shell Co.*, *supra*, and *United States v. Wheeler*, *supra*. Federal and Puerto Rico

prosecutors are agents of, and owe their existence to the same sovereign, just as the Federal District Court of Puerto Rico and the Supreme Court of Puerto Rico are tribunals of the same sovereign exerting all their powers by authority of the Congress of the United States.

The United States cannot, through its agents, conduct multiple prosecutions exposing the same citizen to multiple trials for the same offense by authorizing two separate prosecutorial agencies to prosecute the same individual for the same offense.

(C) *The Hearing De Novo Rule In Elkins v. United States, supra, Should Not Be Applied Under The Facts Of This Case Even If The Dual Sovereignty Doctrine Is Applicable.*

It is submitted that even in successive prosecutions where the dual sovereignty doctrine applies, the hearing de novo rule in *Elkins* should not be applied where a defendant has successfully established in the first forum that the search was illegal upon the grounds that law enforcement agents utilized intentionally false statements to support the probable cause for the search.

In *Elkins*, this Court deemed it important that the test of admissibility of evidence be one of *federal law* in the interest of consistency in the interpretation and application of the rights of individuals against unreasonable searches and seizures, at a time when all States did not apply the exclusionary rule. But would the Court have required a hearing de novo where the State Court's ruling of illegality was based upon a *fact finding* of police perjury to establish probable cause – as in the case at bar?

Here, the Puerto Rico court issued a warrant for the search of a private home, relying upon statements under oath of Puerto Rico police officers, and subsequently determined that those statements were false – requiring that the searches and seizures of the defendant be declared unreasonable, the evidence be excluded, and the defendant discharged, to deter similar unlawful police conduct in the future.

The federal government with prior knowledge of the decision of the Puerto Rico Court, was permitted to offer the same

evidence in its prosecution against the defendant for similar crimes, utilizing the same search warrant and the same testimony of police officers who had been found perjurious by the Puerto Rico Court. In so doing the federal court permitted forum shopping, encouraged police perjury and not only subverted the authority of the Puerto Rico court to deter the misconduct of Puerto Rico police officers in the future, but in effect rewarded law enforcement officers for engaging in criminal conduct.

Such a result in the application of the hearing de novo rule in *Elkins* could not have been contemplated by the Court, which in the same decision expressed the following:

> "The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts. Yet when a federal court sitting in an exclusionary state admits evidence lawlessly seized by state agents, it not only frustrates state policy, but frustrates that policy in a particularly inappropriate and ironic way. For by admitting the unlawfully seized evidence the federal court serves to defeat the state's effort to assure obedience to the Federal Constitution." *Elkins* at p. 221.

2. The Imposition Of Multiple Cumulative Punishment For Simultaneous Possession Of Heroin and Cocaine Violated The Petitioner's Rights Under The Double Jeopardy Clause Of The Fifth Amendment Of The United States Constitution.

This case involved a simultaneous possession of two different controlled substances charged in separate counts of the same indictment as two violations of only one statutory provision, 21 U.S.C. §841(a)(1) (Appendix, infra, p. A-28) which is part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1242 (hereinafter "Federal Controlled Substances Act or Drug Act of 1970").

Under count one, the controlled substance was 136.87 grams of cocaine and under count two, the controlled substance was 74.76 grams of heroin.

Under 21 U.S.C. §802(17) (Appendix, infra, p. A-28) both heroin and cocaine are defined as narcotic drugs. Heroin is classified

as a Schedule I narcotic drug controlled substance and cocaine as a Schedule II narcotic drug controlled substances [21 U.S.C. §812(c)]. (Appendix, infra, p. A-28) Since the weight of the cocaine was less than 1,000 grams and the weight of heroin less than 100 grams, under the penalties provision of the statute, 21 U.S.C. §841(b)(1)(B) (Appendix, infra, p. A-28) (as amended October 12, 1984) the maximum sentences permissible under counts one and two were the same. A term of imprisonment of not more than fifteen years, a fine of not more than $125,000.00, or both, and a special parole term of at least three years.

Congress did not expressly authorize under 21 U.S.C. §841(a)(1) (Appendix, infra, p. A-28) the imposition of multiple cumulative punishment for simultaneous possession of two different controlled substances and unless such an intent may be gleaned from the legislative history of the Act or other sources bearing on such intent, under the rule of lenity applied in *Bell v. United States*, 349 U.S. 81 (1955) (hereinafter *Bell*), the ambiguity must be resolved in the defendant's favor.

Relying on the rule of lenity in *Bell*, the Petitioner moved below for consolidation of counts one and two upon the grounds that both counts alleged one offense and that to impose separate sentences after conviction for both counts would violate defendant's right under the double jeopardy clause, fifth amend., United States Constitution.

The district court denied Petitioner's motion for consolidation and after conviction imposed the maximum prison term of fifteen years as to each count to run consecutively. The resulting thirty-year term of incarceration being clearly in excess of the maximum period authorized for one violation under 21 U.S.C. §841(b)(1)(B). (Appendix, infra, p. A-28)

The fact that Congress did not explicitly provide for cumulative punishment for simultaneous possession of different controlled substances in the Drug Act of 1970 is a clear indication that no such punishment was intended.

This is so because at the time of the enactment of the Act the rule of lenity was almost universally applied by the courts where the legislature had not clearly expressed its desire that cumulative

punishment be imposed for two offenses arising out of the same act, and if Congress had harbored that desire, it would have expressed it. Furthermore, since Congress established a meticulously balanced and detailed punishment structure under the Act, if it intended to authorize such serious punishment, it would have included it.

In *Bell*, this Court said, at P. 83, "When Congress has the will it has no difficulty in expressing it — when it has the will, that is, of defining what it desires to make the unit of prosecution, and more particularly, to make each stick in a fagot a single criminal unit" and in *Albernaz v. United States*, 450 U.S. 333 (1981) Chief Justice Rehnquist said, at p. 341, "Congress is 'predominantly a lawyer's body'...and it is appropriate for us 'to assume that our elected representatives...know the law'. "

Therefore, Congress must have been aware of the numerous federal and state decisions applying the rule of lenity where legislatures had not clearly expressed a desire that cumulative punishment be imposed for simultaneous possession of two different drugs, and if Congress had the will to authorize cumulative punishment in such cases it would have clearly expressed it.

What Congress did express in enacting the Drug Act of 1970 was a desire "to provide for an overall balanced scheme of criminal penalties for offenses involving drugs." H.R. Rep. No. 91-1444, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 4567. As the court noted in *United States v. Gomez*, 593 F.2d 210, 213 (3rd Cir. 1979), *cert. den.*, 441 U.S. 948 (1979):

> "The penalty provisions of the Act have been orchestrated in meticulous detail. Maximum permissible sentences are made to depend, in part, on the type of substance that is manufactured, possessed, or distributed....Sentence severity also depends on the existence of the defendant's prior convictions and the exact nature of the offense charged....Under the statute, maximum penalties are generally doubled if the defendant has been previously convicted of a drug offense,...or if the crime involved distribution to persons under the age of twenty one....In contrast, penalties are reduced when the only crime involved is personal possession. Conspiracies are subject to punishment separate and apartment

> from the punishment imposed for substantive offense. Severe separate penalties are mandated for persons convicted of engaging in a continuing criminal enterprise." *Citations omitted.*

In view of such a comprehensive penalty structure the omission of cumulative punishment for simultaneous possession of two different controlled substances indicates an intent on the part of Congress not to authorize it.

The circuit court affirmed the erroneous multiple cumulative punishment noting with approval decisions of the second, fourth, fifth and sixth circuits holding that (a) simultaneous possession of two different controlled substances constitute violations of two discrete statutory provisions under the test in *Blockburger v. United States*, 450 U.S. 333 (1932) (hereinafter *Blockburger*) and (b) that such an interpretation was most consistent with Congress' expressed intent to give maximum flexibility to judges in imposing sentences under the Drug Act of 1970.

In *United States v. Pope*, 561 F.2d 663 (6th Cir. 1977) (hereinafter *Pope*); *United States v. Davis*, 656 F.2d 153 (5th Cir. 1981), *cert. den.*, 456 U.S. 930 (hereinafter *Davis); United States v. Grandison*, 783 F.2d 1152 (4th Cir. 1986), *cert. den.*, 107 S.Ct. 160 (1986) (hereinafter *Grandison*); and in *United States v. DeJesus*, 806 F.2d 31 (2nd Cir. 1986) (hereinafter *DeJesus*) the cases relied upon by the circuit court, the courts reached the same result by conflicting reasoning and without reliance on sound precedence or much elaboration.

The Courts in *Pope*, *Grandison* and *DeJesus*, *supra*, appear to say that because controlled substances are listed in separate schedules providing for different penalties, a separate and distinct statutory provision results as to each schedule requiring the application of the *Blockburger* test to determine congressional intent. Under that interpretation *Bell* is not controlling because simultaneous possession of two different controlled substances would constitute one act violating two statutory provisions.

In *Davis*, *supra*, which is relied upon by the courts in *Grandison* and *DeJesus* as to result, the court rejects that reasoning. In *Davis*, a case in which the defendant was charged with

simultaneous possession of marijuana, a Schedule I Substance and of quaaludes, a Schedule II Substance in separate counts, the court stated that the *Blockburger* test was not applicable since simultaneous possession of two different controlled substances violated only one statutory provision and the rule of lenity in *Bell* was applicable unless congressional intent to authorize cumulative punishment was clearly indicated.

Although the *Blockburger* test has been referred to as the "same evidence" test, that standard focuses not on the evidence adduced at trial but rather on the elements of the offense charged. *Brown v. Ohio*, 432 U.S. 161, 166 (1977); *United States v. Phillips*, 664 F.2d 971, 1006 (5th Cir. 1981) The element of proof under 21 U.S.C. §841 (a)(1) that concerns us here is the requirement that the substance possessed be a "controlled substance" as defined in the Act.

To prove that element in cases involving simultaneous possession of two different controlled substances charged in separate counts, all that the Government is required to prove as to each count is that the substances are *controlled substances as defined in the Act.*

To hold that because two different types of controlled substances are charged, an additional and distinct element is required to be proved as to each count, is to violate the fundamental rule that the legislature's purpose is expressed by the ordinary meaning of the words. The fact that a rifle and a pistol are two distinct types of firearms separately defined under a statute prohibiting possession or receipt of a firearm by certain individuals does not permit cumulative punishment for simultaneous possession of those two types of firearms. *U.S. v. Marino*, 682 F.2d 449 (3rd Cir. 1982)

It is submitted that the *Davis* Court was correct in its reasoning that the *Blockburger* test did not apply. The court found that the purpose for the scheduling of controlled substances under the Act was not solely to set penalties for violations, but primarily to control the substances themselves. It noted that the main difference between Schedule I and Schedule II controlled substances, was the fact that Schedule I controlled substances have no medical use and Schedule II controlled substances have medical use, and

found it curious that under the *Pope* rationale there would have to be a single sentence for simultaneous possession of heroin and marijuana because they fall into the same Schedule, but multiple sentences for simultaneous possession of marijuana and quaaludes because they fall in different Schedules. Davis, *supra*, at p. 160.

Holding that *Bell* was applicable, the *Davis* court then proceeded to its own analysis of congressional intent. In reviewing the legislative history of the Drug Act of 1970 it found that since Congress intended to give "maximum flexibility" to judges in the imposition of sentences under the Act, that Congress clearly intended that cumulative punishment be authorized for simultaneous possession of different controlled substances, and the rule of lenity did not apply.

The analysis of Congressional intent by the *Davis* court is unsound and without support in the language of the statute or its legislative history. The "maximum flexibility" language upon which the Court relied to support its conclusions is found in U.S. Code Cong. & Ad. News, 4566, *supra*, at p. 4576.

> "[T]he foregoing sentencing procedures give maximum flexibility to judges, permitting them to tailor the period of imprisonment, as well as the fine, to the circumstances involved in the individual case.
>
> The severity of existing penalties, involving in many instances minimum mandatory sentences, have led in many instances to reluctance on the part of prosecutors to prosecute some violations, where penalties seem to be out of line with the seriousness of the offense. In addition, severe penalties, which did not take into account individual circumstances, and which treat casual violators as severely as they treat hardened criminals, tend to make convictions somewhat more difficult to obtain. The committee feels, therefore, that making the penalty structure in the law more flexible can actually serve to have a more deterrent effect than existing penalties, through eliminating some of the difficulties prosecutors and courts have had in the past arising out of minimum mandatory sentences...."

A reading of the entire House Report, supra, reveals that Congress was really concerned with the lack of flexibility in sentencing imposed upon judges by the mandatory minimum penalty provisions of the prior law. Recognizing that in many cases the mandatory minimum penalty was clearly out of line with the circumstances of the offense and of the individual defendant, Congress desired to give greater flexibility to judges in imposing sentences by eliminating mandatory penalties except for continuing criminal enterprise and by creating a comprehensive penalty structure.

The "maximum flexibility" language cited by the *Davis* court cannot be the basis for a finding that Congress intended to extend the broad authority in sentencing claimed by the court.

3. The Petitioner Was Denied A Fair Trial By The District Court During The Evidentiary Hearing On His Motion To Suppress Evidence.

The circuit court erred in holding that on the record there was no clear showing of abuse of discretion by the district court in (a) denying Petitioner's request for a continuance to obtain the transcript of the local suppression hearing to impeach hostile witnesses, (b) denying Petitioner an overnight continuance to produce additional witnesses, and (c) ruling that Petitioner had the burden of going forward to prove the illegality of the searches and seizures.

In its recital of the facts the court failed to accurately adhere to the record and disregarded facts crucial to the issue of whether the district court abused its discretion in denying Petitioner's applications for continuance.

The court's statement that Petitioner, "never clearly asserted his need of the transcript for impeachment purposes which he nonetheless could have obtained prior to the hearing and without a continuance" (Appendix, infra, p. A-20) is absolutely without support in, and contrary to, the record before the court.

The Petitioner's motion to suppress was predicated upon lack of probable cause due to reliance by the prosecutor upon false police testimony to obtain the search warrant and to justify the

warrantless search. As of May 6, 1986, when the Petitioner's motion to controvert the warrant and suppress the evidence was filed, the district court and the federal prosecutor were advised that the Petitioner would attempt to meet the standards under *Franks v. Delaware*, 438 U.S. 154 (1978), by submitting evidence of police perjury particularly by the use of inconsistent statements of police officers during the suppression hearing held in the Superior Court of Puerto Rico.

The need for the transcript of the suppression hearing for the purpose of attacking the credibility of police officers' testimony was also clearly brought to the attention of the district court on May 12, 1986 in support of the application for a continuance.

With respect to the unsupported assertion of the circuit court that Petitioner could have obtained a certified transcript of the proceedings of the suppression hearing before the Puerto Rico court within twelve days, it is submitted that experienced judges and attorneys practicing in Puerto Rico are painfully aware of the fact that court orders are necessary to request the preparation of certified transcripts in the local courts and that it takes months to obtain such transcripts. This is evidenced by the statement of the District Court Judge that he could not wait two or three months for the transcript to be obtained by the Petitioner.

The court below dismissed in a six-line paragraph (Appendix, infra, p. 20) Petitioner's contention that the district court abused its discretion by denying Petitioner's request for an overnight continuance to produce witnesses, disregarding the following crucial facts: That on May 12, 1986 the court had indicated to the Petitioner that he would have one week to try his suppression motion if necessary; that the request for the continuance was made on May 13, 1986, the first day of the hearing, at approximately 3:30 p.m.; and that although Petitioner had not subpoenaed any witnesses, the court was informed that Petitioner had available for the following day several rebuttal witnesses on the crucial issue of whether the police officers' statements to establish the probable cause to invade the Petitioner's privacy were intentionally false. Accordingly, the result of the district court's refusal to grant the overnight continuance was to deprive the Petitioner of his only opportunity to present crucial evidence in his defense.

No objection was made by the Government to the Petitioner's application for an overnight continuance. In denying the Petitioner's request, the only grounds relied upon by the court were the fact that it was 3:30 in the afternoon and that the Petitioner had failed to subpoena any witnesses.

There is no requirement that only witnesses who are subpoenaed may testify on behalf of the defense.

Under the circumstances of this case, where the prosecutor and the court had been made aware of the fact that a judge of the Superior Court of Puerto Rico had found that the same police officer witnesses that were being utilized by the Government had lied to a judge of the Court of Puerto Rico to obtain the search warrant upon which the Government relied in this case, and that one of those police officers had a record of mendacity – the proper exercise of discretion required that the court grant the defense every opportunity to present the same rebuttal witnesses upon which the Puerto Rico judge relied to make his finding of police perjury.

The Court's denial of the right of the Petitioner to present witnesses in his own behalf and confront hostile witnesses was a flagrant denial of his Sixth Amendment rights in direct conflict with the holdings in *Davis v. Alaska*, 415 U.S. 308 (1974), *Washington v. Texas*, 388 U.S. 14 (1967); and *Pointer v. Texas* 380 U.S. 400 (1965).

The court below further erred in affirming the district court's ruling that the defendant had the burden of going forward on a motion to suppress although the evidence seized was in part the result of a warrantless search. Federal courts overwhelmingly hold that in warrantless searches and seizures the Government has the burden of persuasion and the burden of going forward to establish the reasonableness of the intrusion. E.g., *United States v. Longmire*, 761 F.2d 411 (7th Cir. 1985). In this case a motion to suppress was filed in which the defense contended without opposition that part of the evidence seized was obtained as a result of a warrantless search. The issue of a warrantless search was thus raised and the court granted an evidentiary hearing.

By its holding the first circuit erroneously adopts a rule that in every motion to suppress the defendant has the burden of

going forward regardless of which party has the burden of persuasion.

4. The Sentences Imposed Constituted Cruel and Unusual Punishment In Violation Of The Eighth Amendment Of The United States Constitution.

The district court imposed the maximum jail sentences as to all counts for which the Petitioner was convicted and ordered that the fifteen-year jail terms imposed under counts one and two of the indictment run consecutively. In so doing, the court imposed a maximum of thirty years imprisonment for the simultaneous possession of heroin and cocaine with a combined weight of approximately 220 grams.

The circuit court agreed that the thirty-year jail sentence in this case "may appear harsh" (Appendix, infra, p. A-24) but nevertheless sanctioned what was a mechanically imposed sentence disregarding the Petitioner's personal history and background while reflecting the trial court's personal view of the opprobrium of the crimes charged.

Recognizing positive social attributes in the Petitioner's personal background as evidenced by numerous letters of recommendation submitted to the court on behalf of the Petitioner, the court nevertheless gave weight only to the nature of the offense, as opposed to the magnitude of the Petitioner's misconduct, and to the reference made by the prosecutor of the clamor in the news media that rampant crime was a serious problem affecting the Island of Puerto Rico.

Although the jail sentences imposed are within statutory limits, they are grossly disproportionate to the crimes committed and subjected the Petitioner to cruel and unusual punishment.

5. The Petitioner's Motion to Suppress The Evidence Seized From Him By Puerto Rico Police Officers On September 18th and September 19, 1985 Should Have Been Granted.

A search and seizure violates the fourth amend., U.S. Const., unless conducted pursuant to a valid search warrant, by consent

or incidental to a lawful arrest. *United States v. Chadwick*, 433 U.S. 1 (1977); *Arkansas v. Sanders*, 442 U.S. 753 (1979).

On September 18, 1985 the Petitioner was placed under arrest immediately upon the arrival of the police officers at a gas station where he was servicing his car. The arrest was not predicated upon observations of criminal conduct by the police officers who made the arrest but upon information which the officers had received from another officer over the radio.

The information received by the arresting officers was not totally inconsistent with innocent behavior and while it may have been sufficient to permit an investigative stop, it was insufficient to establish probable cause to arrest at gun point.

There being no probable cause to arrest, *New York v. Belton*, 453 U.S. 454 (1981), did not apply. Accordingly, the incidental searches of the Petitioner and of his car were unreasonable, and the pistol which was found inside of the leather handbag on the front seat of the car should have been suppressed.

The Petitioner met his burden of proof under *Frank v. Delaware, supra*, and his motion to controvert the warrant should have been granted.

Probable cause for the issuance of the warrant to search the Petitioner's home on September 19, 1985 could not have been established in the absence of the evidence provided by Officer Santiago of two "drug-related" transactions at the Petitioner's home on September 18, 1985 at 9:30 a.m. and at 10:30 a.m.

The record clearly establishes the falsity of Officer Santiago's statements. Two of his fellow officers testified that at 10:30 a.m. he was at the Drug Division Office and not conducting surveillance.

The "good faith exception" to the exclusionary rule is not applicable where the search warrant is obtained upon intentionally false statements. *United States v. Leon*, 468 U.S. 897 (1984).

Conclusion

For the reasons urged herein, it is respectfully requested that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on December 30, 1987 affirming the judgment of conviction entered against the Petitioner in the Federal District Court for the District of Puerto Rico on December 29, 1986.

Dated: April 14, 1988
Brooklyn, New York

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APPENDIX

UNITED STATES OF AMERICA

v.

FELIPE BONILLA ROMERO.

Crim. No. 86-83(PG).

United States District Court,
Puerto Rico.

July 2, 1986.

OPINION AND ORDER

PEREZ-GIMENEZ, Chief Judge.

Upon the arrest of defendant Felipe Bonilla Romero by local officers on September 18, 1985, and the search of his residence, also by state officials, on September 19, 1985, charges were brought against him at state and federal forums.

As to the charges on the federal forum, on February 19, 1986, the grand jury returned a five-count indictment against defendant. The indictment charges Bonilla Romero thru counts one and two for possession with intent to distribute on September 19, 1985, approximately 140.26 grams of cocaine in violation of 21 U.S.C. § 841(a)(1), and for possession with intent to distribute on September 19, 1985, approximately 181.13 grams of heroin also in violation of 21 U.S.C. § 841(a)(1). In counts three and four he has been charged for receiving on September 18, 1985, a firearm (a Baretta pistol .380 caliber, serial B74400Y, model 84-B) shipped and transported in interstate commerce in violation of 18 U.S.C. § 922(h)(1) and 924(a), and for carrying a firearm (Colt pistol caliber .45, serial 1844G70) on September 19, 1985, during and in relation to the commission of a crime of violence (the possession of narcotics with intent to distribute) in violation of U.S.C. § 924(c). In count five he is charged for having received a pistol (Colt) on September 19, 1985, in violation of 18 U.S.C. § 922(h)(1) and 924(a) since defendant has been convicted for felonies.

On May 12, 1986, the case was called for jury trial. At that time defendant requested continuance of the trial and that in turn a hearing on a motion to suppress filed on May 6, 1986, be held.

Upon defendant's petition the motion to suppress was scheduled for and held on May 13, 1986. At the time arguments were heard from the parties.

At the conclusion of the proceedings on said motion to suppress defendant moved the court to hold its decision on the matter until the state court ruled on a motion to suppress filed at the state court level. The matter was taken under advisement. Thereafter, the opinion rendered by the state court on the motion to suppress was forwarded to this Court and filed on May 19, 1986.

Defendant maintains that in view of the state court decision[1] the evidence seized from the defendant on September 18 and September 19, 1985, must be suppressed in the federal court. It is contended that the evidence is not admissible since, as determined by the state court judge, there was no probable cause to arrest the defendant and the search of defendant's home on September 19, 1985, was invalid because the search warrant was predicated on false statements.

[1] The threshold question in this matter is one which pertains to the independence of judgment of the federal court based on its own appraisal of the evidence.

As stated by the Court of Appeals for the First Circuit in the case of *United States v. Quiñones*, 758 F.2d 40, 43 (1st Cir.1985) "[I]t is well settled that in federal prosecutions evidence admissible under federal law cannot be excluded because it would be inadmissible under state law. Thus, it is a general rule that the federal district courts will decide evidence questions in federal criminal cases on the basis of federal, rather than state law." *United States v. Rickus*, 737 F.2d 360, 363 (3rd Cir.1984).

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[1] The decision ordering that evidence be suppressed was rendered by the Hon. Arnaldo López, Puerto Rico Superior Court Judge, Ponce Part.

This is a case involving a federal crime, and federal law governs the admissibility of evidence in federal trials. Accordingly, the district court must pass on this issue with independence of the state court.

> If the states could require federal courts to exclude evidence in federal criminal cases, some convictions would undoubtedly be lost and the enforcement of congressional policy would be weakened. *United States v. Shaffer*, 520 F.2d 1369, 1372 (3rd Cir.1975), *cert. denied*, 423 U.S. 1051 [, 96 S.Ct. 779, 46 L.Ed.2d 640] (1976).

We must pass to ascertain whether under federal law the evidence obtained is inadmissible and subject to suppression as defendant contends.

> As the Supreme Court has stated:
> In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed. *Elkins v. United States*, 364 U.S. 206, 223-24 [, 80 S.Ct. 1437, 1447-48, 4 L.Ed.2d 1669] (1960).

Aware that the admissibility of evidence against a defendant charged with a federal crime is always to be determined independently by the federal court, *United States v. Mastrangelo*, 733 F.2d 739, 799 (11th Cir.1984), we pass to analyze whether the evidence obtained by state officers to be used against defendant in the federal forum was obtained by an unreasonable search and seizure as defendant avers. *Elkins v. United States*,[2]

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[2] The Supreme Court explicitly stated as follows:

> The question whether evidence obtained by state officers and used against a defendant in a federal trial was obtained by

(footnote continued)

supra; Preston v. United States, 376 U.S. 364, 366, 84 S.Ct. 881, 882, 11 L.Ed.2d 777 (1964); *United States v. Combs*, 672 F.2d 574, 578 (6th Cir.), *cert. denied*, 458 U.S. 1111, 102 S.Ct. 3495, 73 L.Ed.2d 1374 (1982); *United States v. Castillo*, 449 F.2d 1300, 1301 n. 2 (5th Cir.1971).

Therefore, we will make an independent finding concerning the probable cause for arrest on September 18, 1985, and the reasonableness of the search warrant that was issued and executed on September 19, 1985. Through our own independent evaluation we must determine whether the evidence was obtained in an illegal way and with reckless disregard for the truth.

At the hearing held before us on the motion to suppress,[3] the Court received the testimonies of Agents Caín Santiago Figueroa and Angel Luis Negrón Santiago, the two agents who offered affidavits in support for the search warrant. The testimonies of Miguel A. Cochrán Acosta, defendant's attorney in state court proceedings, and that of defendant himself were also received.

We have examined and weighed the witnesses' credibility, *United States v. Baldacchino*, 762 F.2d 170, 175 (1st Cir.1985); *United States v. Jobin*, 535 F.2d 154, 157 (1st Cir.1976), in reporting the findings which follow.

Agent Caín Santiago has been an agent at the Drugs and Narcotics Division in Ponce and has been a police officer with that unit for a period of four years (Tr. 32). He testified that his supervisor, Sergeant Pedro F. Arévalo instructed him to conduct a surveillance of defendant's house (Tr. 35-36)[4] in relation to illegal activities that were being carried out there. He stated that on September 18, 1985, he proceeded to conduct a surveillance from a white van prepared for this type of operations (Tr. 61),

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unreasonable search and seizure is to be judged as if the search and seizure had been made by federal officers. *Elkins v. United States*, 364 U.S. at 206 [, 80 S.Ct. at 1437] (1960).

[3] Transcript of proceedings was filed on May 14, 1985.

[4] He gave a thorough description of defendant's house (Tr. 60).

which he parked in front of defendant's residence at a distance of 25 to 30 feet. The van offered clear visibility from inside out but not from outside in (Tr. 61). While conducting this surveillance on September 18, 1985, in less than two hours he witnessed two transactions (Tr. 46-47) which, given his experience (Tr. 60), appeared to be related to controlled substances.

Two vehicles went there in the morning. The first, a beige color Champ, parked parallel to where the official vehicle (Van) was parked. He described how a man entered defendant's home and around five minutes later came out carrying a small plastic transparent bag containing a white powder inside. He was unable to jot down the license plate number since the driver pulled out in reverse (Tr. 62).

Thereafter, another vehicle, which the witness described as a white colored Mitsubishi, came and parked in front of defendant's residence (Tr. 62). The individual called and defendant came out. After they conversed defendant Bonilla handed over a plastic bag containing white powder while the man handed over an amount of money to defendant (Tr. 63). The agent stated that given the position in which the vehicle was parked he was able to observe and jot down the license plate number (Tr. 63). He called and the vehicle was reported stolen (Tr. 49, 54, 63-64). At this point the agent then decided to go to the drug division and inform his supervisor, Sergeant Pedro F. Arévalo, about what had happened (Tr. 47, 64). Later on, he returned to the site. Agent Angel Luis Negrón Santiago drove, and upon arrival Agent Caín Santiago remained and Agent Negrón Santiago left.

While there and in the early afternoon, Agent Caín Santiago saw defendant coming out of his residence and getting to his car, which was parked in front of the residence. The agent stated he saw defendant carrying on the left side of his waist a black colored pistol (Tr. 64). Knowing that defendant Bonilla Romero had been convicted and as such was impeded from carrying a firearm, he gave the information over the radio to Agent Negrón (Tr. 64). Later on he found that defendant had been arrested and that a gun had been occupied along with two small plastic envelopes containing a white powder (Tr. 66) similar to the ones

he had seen before in the morning of September 18, 1985, while effecting the surveillance ordered by Sergeant Arévalo (Tr. 66).

On that day, September 18, 1985, defendant was taken before Magistrate Prudencio Collazo Padín (Tr. 68); he admitted that the pistol and the drug seized belonged to him.

For the illegal reception of said gun, which was occupied during the arrest on September 18, 1985, defendant is charged in count three of the indictment under 18 U.S.C. § 922(h)(1) and 924(a).

[2] We find there was probable cause for defendant's arrest. Concerning an arrest, "probable cause exists when the facts and circumstances within the [arresting officers'] knowledge . . . are sufficient in themselves to warrant a man of reasonable caution in the belief that the suspect has committed or was committing an offense". *Draper v. United States*, 358 U.S. 307, 313, 79 S.Ct. 329, 333, 3 L.Ed.2d 327 (1959).

The agent testified that during the surveillance of defendant's residence he witnessed defendant carrying a pistol as the defendant was leaving his home the afternoon of September 18, 1985. The observation by the agent of this concrete illegal act is the fact which brings about defendant's arrest on September 18, 1985. This fact was transmitted thru the radio, the defendant was followed and thereafter arrested by police officers.

We now turn to the facts pertaining to September 19, 1985. On this day Agent Caín Santiago gave a sworn statement before the Honorable Victor Rodriguez Bou[5] on the facts which occurred the prior day, September 18, 1985. He met with the judge (Tr. 38) and spoke to him about the facts of September 18, 1985 (Tr. 39), and also told him that his sources were reliable (Tr. 37). The common proceedings were followed, the judge verified the affidavit, and after reading and checking it signed the search warrant (Tr. 88).

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[5] He indicated that he has appeared on a great number of occasions before Judge Rodriguez Bou (Tr. 72).

The testimony of Agent Angel Luis Negrón Santiago corroborates Agent Caín Santiago's testimony. Agent Negrón Santiago was at the drug division in Ponce with Sergeant Arévalo and two other agents[6] on September 18, 1985, when Agent Caín returned to the office in the morning of that day (Tr. 90-91). He heard when Agent Caín Santiago told Sergeant Arévalo about the stolen car incident while conducting the surveillance of defendant's residence in the morning (Tr. 91). The witness explained that additional details of what happened that morning were given to the supervisor with whom agent Caín Santiago met out of their presence (Tr. 96).

Agent Negrón relates, offering further corroboration to what was declared by Agent Santiago, that he drove him back to continue the surveillance of defendant's home on September 18, 1985, and that later on he was called thru the radio by Agent Caín Santiago to inform that defendant was leaving his home carrying a firearm.[7]

On September 19, 1985, Agent Negrón, along with Agent Caín Santiago, appeared before a state magistrate (Honorable Rodriguez Bou) to give the statements that gave rise to the search warrant (Tr. 101).

Defendant contends that the affidavit of Agent Caín Santiago is insufficient to establish probable cause to obtain the search warrant. He raises the possibility that the warrant is stale. He avers that the affidavit given by Caín Santiago is undated, that the same does not establish the date when the supervisor instructed him to commence the surveillance of defendant's residence, and that the affidavit fails to state when Agent Caín made the alleged observations. He relies on a number of cases and cites Puerto Rican and federal jurisprudence on the point.[8]

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[6] These two other agents were identified to be Sergeant Ortiz and Agent Campos Camacho.

[7] These facts led to defendant's arrest on that day on which evidence was seized and which defendant admitted belonged to him (Tr. 119).

[8] Defendant cites: *Figueroa v. Tribunal Superior*, 72 P.R.R. 23, 24 (1951); *Pueblo v. Tribunal Superior*, 91 D.P.R. (1964); *SGRO v. United States*, 287 U.S. 206,

(footnote continued)

[3] Jurisprudence cited by plaintiff makes it clear that the date when the facts were observed is essential in order to provide the judge a concrete element which would enable him to determine whether said date is too remote, or on the contrary, to conclude that there is still a possibility that the evidence sought to be seized may still be in the place to be searched. Since probable cause is required for the issuance of the search warrant, it is important to know the date of the observed facts to determine whether those facts are remote because, if they are, it cannot be reasonably stated that probable cause exists at the time the search warrant is requested.

The crux of the problem is whether or not there was probable cause at the time the search warrant was issued.

[4] Can we say that here there was no probable cause for the search? The probable cause determination in response to the motion to suppress must be made upon the basis of the information which was presented to the magistrate at the time the warrant was issued. 1, Wayne La Fave, *Search and Seizure*, § 3.1, at 447 (1978).

In ascertaining whether probable cause exists recent federal jurisprudence calls for a "totality of the circumstance" test. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The *Illinois v. Gates, supra*, decision establishes that the probable cause standard is a "practical non technical conception" and a fluid concept not readily reduced to a neat set of legal rules.

[5] Under this standard the Court is called upon to decide whether the evidence viewed as a whole provided substantial basis for the magistrate's determination of probable cause. *Massachusetts v. Upton*, 466 U.S. 727, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984). This substantial basis standard of review embodies a great deference to a magistrate's probable cause determination. *United States v. Seybold*, 726 F.2d 502, 503 (9th Cir.1983).

It is now settled that the duty of a reviewing court is simply to insure that the magistrate had a substantial basis for

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53 S.Ct. 138, 77 L.Ed. 260 (1932); *United States v. Chesher*, 678 F.2d 1353 (9th Cir.1982); *United States v. Beltempo*, 675 F.2d 472 (2nd Cir.1982); *United States v. Johnson*, 461 F.2d (10th Cir.1972).

concluding that probable cause existed. *Illinois v. Gates*, *supra*. We now turn to the facts contained in the affidavit.

[6] In the instant case the affidavit of agent Caín Santiago describes facts which are evidently related to drug trafficking. In ascertaining the probability of an illegal activity being carried out, the conduct described and the agent's expertise cannot be neglected. An officer is able to identify some illegal substance by sight given his training or experience in making that type of identification. *United States v. Rosario*, 638 F.2d 460, 462 (2nd Cir.1980), *cert. denied*, 450 U.S. 1000, 101 S.Ct. 1707, 68 L.Ed.2d 202 (1981); *United States v. Canieso*, 470 F.2d 1224, 1228 (2nd Cir.1972). Through testimony it was established that Agent Caín Santiago is an experienced officer. It is clear that actions and things observed by an experienced law enforcement officer may have more significance to him in determining whether the law is being violated at a given time and place than they would have to a layman. *United States v. McClard*, 333 F.Supp. 158, 168 (E.D.Ark.1971), *aff'd.*, 462 F.2d 488, (8th Cir.1972), *cert. denied*, 409 U.S. 988, 93 S.Ct. 345, 34 L.Ed.2d 255 (1972). This is precisely what the agent declared he observed on the morning of September 18, 1985, while conducting the surveillance of defendant Felipe Bonilla Romero's residence, facts that he communicated to his supervisor and which he incorporated in his affidavit.

The exchange which took place and the substance described in the plastic bags conform to a pattern indicative of a narcotics transaction, *United States v. Green*, 670 F.2d 1148, 1152-1153 (D.C.Cir.1981), and of an ongoing criminal activity taking place.

The declaration of Agent Caín Santiago describes with sufficient precision a type of activity which justifies the issuance of the search warrant. Defendant's main challenge is that the declaration makes no reference to the date when the facts were observed and contends that, therefore, there was no probable cause to issue the warrant.

Under *Gates*, *supra*, we must look to the totality of the circumstances and to the affidavit as a whole, *United States v. Sorrells*, 714 F.2d 1522, 1528 (11th Cir.1983).

We find that in the instant case two declarations were presented before the magistrate. These two declarations must be examined jointly since they compliment each other. The date clearly appears in the declaration offered by Agent Negrón Santiago.

It is not disputed that at what time the facts occurred is critical in determining whether there is probable cause to search. In the case at hand from the combined analysis of both declarations it appears that the events narrated by Agent Caín Santiago were observed on September 18, 1985, since the averments of both declarations interlock. It appears then that the magistrate to whom the affidavits were presented could easily ascertain the date of the facts narrated. Thus, there is a clear indication of when affiant Caín Santiago witnessed the transactions. Therefore, the timeliness of the probable cause is not undermined.

It has been held that when a statement made in affidavit in support of a request for a search warrant does not contain the date of the alleged facts and it is factually interrelated with other information which does contain a date then the inference that the events took place in close proximity to the date given is permissible. *United States v. Holliday*, 474 F.2d 320, 322 (10th Cir.1973). In the case before us the interrelation of the two affidavits presented before the magistrate collectively supply sufficient facts to support a finding of probable cause given the proximity of the observed facts to the day when the search warrant was obtained. *United States v. Dennis*, 625 F.2d 782, 792 (8th Cir.1980).

It must also be of legal consequence that the magistrate had before him not only the sworn statements of the two agents but also the fact that he examined both affiants personally. The search warrant clearly establishes this fact. It is stated therein:

> *From the examination of the affiants and the sworn statements*, this magistrate finds that probable cause exists to issue a search warrant and therefore orders that you immediately proceed during the day or nighttime hours to search the residence located at PP-58

> 42nd Street, Jardines del Caribe, Urb., Ponce, P.R., searching for any controlled substance or any other thing you may find in violation of the Controlled Substance Act, and should it be found by you in its entirety to bring it immediately and together with the executed order before me at the District Court of Ponce, P.R. . . . . (emphasis ours)

The decision to issue a warrant must be sustained unless it lacks a substantial basis under the "totality of circumstances." *United States v. Butler*, 763 F.2d 11, 14 (1st Cir.1985).

Given the totality of the facts and circumstances in this case, *Gates, supra*, we find that the magistrate had before him factual allegations which provided a substantial basis for concluding that there was a fair probability that criminal evidence would be found in defendant Felipe Bonilla Romero's residence. Probability is the standard of probable cause. *Illinois v. Gates, supra*, 462 U.S. at 231-232, 103 S.Ct. at 2328-29. The magistrate had sufficient information from which he could conclude the existence of probable cause. *United States v. Maestas*, 546 F.2d 1177, 1180 (5th Cir.1977).

[7] Finally, we see no reason to discredit affiants' truthfulness concerning the facts. There is a presumption of validity with respect to the affidavit supporting the search warrant, *Franks v. Delaware*, 438 U.S. 154, 171, 98 S.Ct. 2674, 2684, 57 L.Ed.2d 667 (1978), and no showing has been made to this Court in the sense that false statements were included in the affidavit.

WHEREFORE, in view of the foregoing, we find that there was probable cause to issue the search warrant on September 19, 1985, based on the declarations of Agents Caín Santiago and Angel Negrón Santiago. *United States v. White*, 766 F.2d 22, 25 (1st Cir.1985); *United States v. Freitas*, 610 F.Supp. 1560, 1564 (D.C.Cal.1985).

Accordingly, defendant's motion to suppress the evidence is hereby DENIED.

IT IS SO ORDERED.

UNITED STATES OF AMERICA,

Appellee,

v.

FELIPE BONILLA ROMERO, a/k/a "FELO BONILLA,"

Defendant, Appellant.

No. 87-1052.

United States Court of Appeals,
First Circuit.

Decided Dec. 30, 1987

TORRUELLA, Circuit Judge.

Felipe Bonilla Romero appeals his conviction and subsequent sentence on four counts of federal drug and firearm violations. We affirm.

During a surveillance of Bonilla's home on September 18, 1985, a Puerto Rico government agent witnessed evidence of two drug transactions. The agent subsequently saw Bonilla leave his home by car in possession of a pistol and communicated this fact to other Puerto Rico officers. These officers arrested appellant and, during a search of his car, found the pistol and small amounts of cocaine and heroin. He was then arraigned on weapons and drug charges under Puerto Rico law and released on bail.

The following day a warrant for the search of Bonilla's home was issued on the basis of affidavits of two officers involved in the previous day's surveillance and arrest and the evidence seized during the arrest. Appellant's home was searched, another gun and approximately one-tenth of a kilogram of heroin and cocaine were found, and appellant again was arrested. He was arraigned on further weapons and drug charges under Puerto Rico law.

Five months later, on February 19, 1986, appellant was indicted on the basis of this evidence in the United States District

Court for the District of Puerto Rico on one count of possession with intent to distribute heroin and one count of possession with intent to distribute cocaine, both pursuant to 21 U.S.C. §841(a)(1), and on two counts of receiving firearms in interstate commerce by a known felon. A fifth count, not at issue here, was later dismissed.

After a suppression hearing conducted at the end of April, 1986, a judge of the Superior Court of Puerto Rico announced he would grant appellant's motion to suppress, for purposes of the local prosecution, the evidence seized on September 18 and 19. The judge seriously doubted the veracity of the officers whose testimony was presented to support the warrantless search of Bonilla's car and whose affidavits were the basis of the search warrant used to search his home. The local prosecution subsequently was dismissed and the decision to suppress is on appeal to the Supreme Court of Puerto Rico.

Appellant was not similarly successful in federal district court. The district judge there held that the federal court was not bound by the decision of the local court to suppress the evidence. He held a hearing *de novo* on the matter and denied appellant's motion to suppress, 639 F.Supp. 1021. At a subsequent bench trial, Bonilla was convicted on all four counts. He received the maximum sentence allowed by statute of fifteen years each, to run consecutively, on the heroin and cocaine charges, and concurrent five year sentences on each of the two firearms charges.

Appellant's allegations can be grouped into five issues. He alleges (1) the government was allowed to relitigate a suppression of evidence issue in violation of the double jeopardy clause; (2) the relitigation of the issue was violative of collateral estoppel principles; (3) he was denied a fair hearing on the suppression issue; (4) the district court abused its discretion in failing to suppress the evidence; and (5) the imposition of the consecutive maximum sentences on the two drug charges was contrary to statute and subjected him to cruel and unusual punishment. We address each allegation in turn below.

Double Jeopardy

[1, 2] Appellant contends the district court was precluded from hearing the federal charges against him due to the restrictions imposed by the double jeopardy clause of the fifth amendment of the United States Constitution. He concedes that his trial in the Puerto Rico Superior Court never commenced, yet argues that the dismissal of charges there *prior* to trial was equivalent to a dismissal for insufficiency of evidence *during* trial. Since the latter recently has been held to be a bar to further prosecution, *see Smalis v. Pennsylvania*, 476 U.S. 140, 106 S.Ct. 1745, 90 L.Ed. 2d 116 (1986), he argues further prosecution of the charges against him is similarly barred. Appellant maintains that "there is no rational distinction" for double jeopardy purposes between a dismissal due to the exclusion of indispensable evidence after a pretrial hearing, and dismissal during trial after a successful objection to the introduction of the same evidence. He suggests that the double jeopardy clause demands the same outcome regardless of whether a defendant has ever been put to trial.

The double jeopardy clause, however, is not a game rule designed to ensure uniformity of result regardless of pretrial strategy or rules of procedure. Rather, the basic principle underlying the constitutional prohibition against double jeopardy is that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957). *See also Serfass v. United States*, 420 U.S. 377, 387-88, 95 S.Ct. 1055, 1062, 43 L.Ed.2d 265 (1975); *United States v. Jorn*, 400 U.S. 470, 479, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971). A defendant who successfully argues a pretrial motion is not subjected to the "embarrassment, expense and ordeal" or a trial. *See Serfass*, 420 U.S. at 391, 95 S.Ct. at 1064. Nor does he suffer the "anxiety and insecurity" of having his guilt or innocence finally determined. Indeed, it is only through

repeated exposure to *trial* that the state enhances the possibility that the defendant "even though innocent . . . may be found guilty." 355 U.S. at 188, 78 S.Ct. at 223, and it is only at trial that one is truly "put in jeopardy of life or limb." U.S. Const. amend. V.

It is now well-settled law, therefore, that jeopardy "attaches" when a trial commences; that is, when a jury is sworn or empanelled or, in a bench trial, when the judge begins to hear evidence. *Willhauck v. Flanagan*, 448 U.S. 1323, 1325-26, 101 S.Ct. 10, 11-12, 65 L.Ed.2d 1147 (1980); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569, 97 S.Ct. 1349, 1353, 51 L.Ed.2d 642 (1977); *Serfass*, 420 U.S. at 388, 95 S.Ct. at 1062; *Illinois v. Somerville*, 410 U.S. 458, 471, 93 S.Ct. 1066, 1074, 35 L.Ed.2d 425 (1973) (White, J., dissenting). We know of no case, and appellant has referred to none, in which jeopardy has been found to have attached prior to either of these events.[9] Appellant believes he is asking us "to break new ground"; he is, however, asking us to bring down the house. We decline to do so. We thus hold that jeopardy did not attach as a result of the suppression of evidence ordered after hearing by the Puerto Rico Superior Court and the subsequent dismissal of charges under Puerto Rico law. Therefore, federal officials did not violate appellant's constitutional right not to be put into jeopardy twice for the same crime.[10]

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[9] The Supreme Court has declined to hear a double jeopardy challenge to a state court decision that an acquittal on the basis of insanity entered prior to the empanelling of a jury did not bar a rehearing on the same issue when the hearing judge had made an error of law. *Rodrigues v. Hawaii*, 67 Hawaii 70, 679 P.2d 615, *cert. denied*, 469 U.S. 1078, 105 S.Ct. 580, 83 L.Ed.2d 691 (1984).

[10] It should be noted that this issue alternatively could be decided on the basis of our recent decision in *United States v. Lopez Andino*, 831 F.2d 1164, 1168 (1st Cir.1987), where we held that, despite Puerto Rico's constitutional status as a territory, it is a separate sovereign for the limited purpose of the double jeopardy clause. That case recognized that Puerto Rico has been given such complete control over its local criminal affairs that it may freely prosecute criminal behavior under its own laws regardless of whether the federal government prosecutes the same behavior under federal law. While I personally

(footnote continued)

Collateral Estoppel

[3, 4] Appellant alternatively argues that, regardless of whether jeopardy attached, relitigation of the suppression issue was barred by the principle of collateral estoppel (now more accurately referred to as "issue preclusion"). It is true that the Supreme Court, in *Ashe v. Swenson*, 397 U.S. 436, 80 S.Ct. 1189, 25 L.Ed.2d 469 (1970), held that collateral estoppel principles can be a bar to further litigation of an issue decided in a criminal defendant's favor. However, that holding, involving relitigation of an issue necessarily determined in the defendant's favor as a result of his acquittal after trial on a prior charge, was squarely based on the Fifth Amendment's guarantee against double jeopardy. *Id.* at 445, 90 S.Ct. at 1195. Since, in this case, jeopardy never attached during the local prosecution, *Ashe* is not controlling.

One circuit, however, has suggested that collateral estoppel principles prohibit a government entity from relitigating a pretrial suppression order in a criminal case. *United States ex rel. DiGiangiemo v. Regan*, 528 F.2d 1262, 1265-67 (2d Cir.1975) (denial of suppression of evidence upheld on other grounds), *cert. denied*, 426 U.S. 950, 96 S.Ct. 3172, 49 L.Ed.2d 1187 (1976). In that opinion, while agreeing that *Ashe* is inapplicable when jeopardy has not attached, Judge Friendly indicated that, in criminal proceedings, collateral estoppel is nonetheless required by due process regardless of whether jeopardy has attached. *Id.* at 1266. *See also United States v. Evans*, 655 F.Supp. 243 (E.D.La.1987) (adopting Judge Friendly's suggestion as basis for holding government prohibited from relitigating admissibility of evidence).[11]

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disagreed with this holding, *see id.* at 1172 (Torruella, J., concurring), it is the law of this Circuit. Therefore, even if appellant actually had been tried under Puerto Rico law, such trial would not have been a bar to the federal prosecution.

[11] The only other circuits to address Judge Friendly's argument have refused to express either their approval or disapproval, although the Third Circuit discussed several important and conflicting considerations implicated by that argument. *See United States v. Hatrak*, 588 F.2d 414 (3d Cir.1978); *see also United States v. Franzen*, 659 F.2d 741 (7th Cir.1981).

While recognizing the merits of Judge Friendly's argument, we find it unnecessary to decide this important constitutional issue at this time inasmuch as the requirements of collateral estoppel are not satisfied by the facts of this case. The requirements of that doctrine include, *inter alia*, that the party to be precluded from relitigating an issue decided in a previous litigation was either a party or in privity with a party to that prior litigation. *See generally* 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶¶ 0.441[3], 0.443[1] (2d ed. 1984); Restatement (Second) of Judgments §§ 27, 39, 41 (1982). In this case, the requirement was not satisfied since the federal prosecutors were neither a party, nor in privity with a party, to the suppression hearing in the Puerto Rico Superior Court.

Under the concept of privity, a non-party to an action nonetheless may be bound by the issues decided there if it substantially controls, or is represented by, a party to the action. Restatement (Second) of Judgments §§ 39, 41 (1982). *See Montana v. United States*, 440 U.S. 147, 154, 99 S. Ct. 970, 974, 59 L.Ed.2d 210 (1979); *Chicago, R.I. & P. Ry. Co. v. Schendel*, 270 U.S. 611, 618-19, 46 S.Ct. 420, 423, 70 L.Ed. 757 (1926); *see also Mother's Restaurant, Inc. v. Mama's Pizza, Inc.* 723 F.2d 1566, 1572 (Fed. Cir. 1983) and cases cited therein. The party estopped due to representation by a party to the action must have been "so closely related to the interest of the party to be fairly considered to have had his day in court." *In re Gottheiner*, 703 F.2d 1136 (9th Cir. 1983). There must be a "substantial identity" of the parties such that the party to the action was the virtual representative of the party estopped. *Chicago, R.I. & P. Ry. Co.*, 270 U.S. at 621, 46 S.CT. at 424; *Pan American Match Inc. v. Sears, Roebuck and Co.*, 454 F.2d 871 (1st Cir. 1972).

Whether a party is virtually representative of a non-party is a question of fact determined on a case-by-case basis. *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir. 1980); *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir. 1975), *cert. denied*, 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137, *reh'g denied*, 423 U.S. 1026, 96 S.Ct. 470, 46 L.Ed 2d 400 (1975). In particular, the source of authority of two government entities

is not dispositive of whether they are in privity. *See Davis v. Eide*, 439 F.2d 1077, 1078 (9th Cir.) (city police officers not bound by issue determined by criminal proceeding in which the state is a party since no measure of control over the proceeding and no interest in its outcome), *cert. denied*, 404 U.S. 843, 92 S.Ct. 139, 30 L.Ed.2d 78 (1971); *Clark v. Richardson*, 431 F.Supp. 105, 122 (D.N.J. 1977) (non-party towns not bound by issue determined in suit which named state and other towns); *cf. United States v. ITT Rayonier, Inc.*, 627 F.2d at 1003 (federal and state agencies in privity due to identical interests and "sufficiently close" relationship in state proceedings); *Aerojet*, 511 F.2d at 719-20 (because both non-party county and party state boards desired that disputed land be conveyed to county, county in "such close relationship" to state boards and thus bound by outcome of litigation). Therefore, despite extensive arguments by both the government and appellant, and recent decisions by this court,[12] regarding Puerto Rico's sovereignty status as a United States territory, resolution of the status issue does not determine whether the federal prosecutors are bound by a pretrial suppression order issued by a Puerto Rico court. Rather, we must determine whether there was a close or significant relationship between the federal and Puerto Rico prosecutors during the local suppression hearing or whether the federal authorities controlled or actively participated in that hearing such that their interests in enforcing federal law were sufficiently represented.

Appellant presents no evidence whatsoever that federal prosecutors were, or should have been, involved in any way in the local prosecution. There is no indication they provided assistance or advice to the local authorities or at any time even discussed the matter. Federal prosecutors had no reason to believe that a Puerto Rico Superior Court judge would be deciding any matters affecting a federal prosecution. The initial suppression hearing concerned purely local charges over which the federal enforcement officials had no authority and thus no interest. We see no reason why the principles of fairness, justice, and judicial

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[12] *See, e.g., supra* n. 2.

economy embodied in the doctrine of collateral estoppel require that this doctrine be expanded to bind a party so remote from the action decided. Therefore, without deciding whether collateral estoppel is generally applicable to criminal prosecutions in the absence of attachment of jeopardy, we hold that, under the facts of this case, Puerto Rico and federal law enforcement officials were not in privity during the local pretrial suppression hearing.

Fair Trial

[5] Appellant contends he was denied a fair trial by the district court during its suppression hearing because it: (1) denied defendant's request for a continuance to obtain the transcript from the local suppression hearing which could have been used to impeach hostile witnesses; (2) denied defendant an overnight continuance to produce corroborating witnesses; and (3) ruled defendant had the burden of going forward to prove the illegality of the searches and seizures.

A denial of a continuance by a district court will not be reversed absent a clear showing of abuse of discretion. *Avery v. Alabama*, 308 U.S. 444, 446, 60 S.Ct. 321, 322, 84 L.Ed. 377 (1940); *Real v. Hogan*, 828 F.2d 58, 63 (1st Cir. 1987); *United States v. Reeves*, 730 F.2d 1189, 1193 (8th Cir. 1984); *Reiss v. United States*, 324 F.2d 680 (1st Cir. 1963). No such abuse is evident in the record before us, which indicates appellant had ample opportunity to obtain a transcript and witnesses. The local suppression hearing was concluded on April 30, 1986 at which time the Superior Court judge announced he was going to grant defendant's motion to suppress the evidence for purposes of the local trial. Defendant's federal trial was scheduled to begin May 12, 1986. The defense thus had twelve days in which to transcribe the tapes of the local suppression hearing for use at the district court trial. Instead, on May 6, nearly three months after the indictment on federal charges and only six days prior to the scheduled trial date, appellant moved for a continuance and for suppression of evidence. The motion for a continuance was heard on May 12. At that time, appellant asserted a continuance was necessary to obtain the Superior Court's order and opinion

and the transcript from that hearing. The essence of his argument was that federal law required the district court to be bound by the local court's decision regarding the suppression issue. The district court properly rejected that argument and scheduled a hearing on the suppression motion for the following day. We note that the denial of the continuance also was properly based, in part, on the recognition that several witnesses had travelled a substantial distance to be present for the trial which had been scheduled to begin that day. Also relevant is the fact that appellant did not argue that he needed the transcript from the local suppression hearing for impeachment purposes. It was not until after the suppression hearing began in federal court on the following day that he expressed that need. No specific request for a continuance was made at that time. Finally, we call attention to the fact that the district court waited until after it had received the Superior Court's opinion on that court's decision to suppress the evidence before it rendered its own opinion on the matter.

The foregoing demonstrates that the district court acted well within its discretionary authority in denying appellant's motion for a continuance. Appellant had based his request primarily on the incorrect belief that the district court would be constrained by the Superior Court's decision due to principles of double jeopardy or collateral estoppel. He never clearly asserted his need of the transcript for impeachment purposes, which he nonetheless could have obtained prior to the hearing and without a continuance. Finally, the district court, while not bound by the suppression decision of the Superior Court, showed proper deference by considering that court's opinion prior to issuing its own decision.

Appellant's contention that the district court abused its discretion denying appellant's request for an overnight continuance to produce witnesses is without merit. We need only note that the hearing was held on the defendant's motion, he had ample time to prepare for that hearing, no new issues were raised there, and yet he failed to subpoena a single witness.

[6] Appellant's final allegation demonstrates a misunderstanding of the difference between burden of production and burden

of persuasion. When suppression of evidence is at issue, the burden is initially upon the party seeking suppression to go forward with specific evidence demonstrating the evidence is tainted. *Alderman v. United States*, 394 U.S. 165, 183, 89 S.Ct. 961, 972 22 L.Ed.2d 176 (1969). When it has acted without a warrant, the ultimate burden of persuasion is then upon the government to show that its evidence is not tainted. *Id.* The district court, therefore, properly placed the burden of going forward on the defendant.

Failure to Suppress Evidence

Appellant contends that the district court abused its discretion by failing to suppress evidence seized during his warrantless arrest on September 18, 1985 and during the search of his apartment pursuant to warrant on the following day. He asserts the officers did not have probable cause to arrest him and that the search warrant was based on affidavits which contained false statements and failed to state the date on which alleged drug transactions were observed.

[7] Probable cause exists when arresting officers have " 'facts and circumstances within [their] knowledge and of which they had reasonably trustworthy information . . . sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Draper v. United States*, 358 U.S. 307, 313, 79 S.Ct. 329, 333, 3 L.Ed.2d 327 (1959) (quoting *Carroll v. United States*, 267 U.S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed. 543 (1925)); *see also Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983). Appellant was a known felon with seven prior felony convictions for drug and weapons violations. He concedes he was observed, by a police officer, entering a car with a pistol and that this information was communicated by radio to the arresting officers who were told to arrest him. The police officer testified he was aware appellant did not have a license to carry a gun. Nonetheless, appellant argues that the arresting officers lacked probable cause since they were not told whether he had a license or temporary permission to carry the pistol and did

not know whether he had disposed of the pistol between the time when he entered the car and the time when he was arrested. We disagree. To require police officers to investigate every *possibility* of innocence prior to effectuating the arrest of a known felon carrying a clearly dangerous weapon would be an undue burden on the police force's efforts to protect the safety of the public.

[8] We also hold that the district court did not abuse its discretion in failing to find that the warrant used to search appellant's apartment was defective. A reviewing court must sustain the validity of a search warrant if under the "totality of circumstances" the issuing magistrate could find there was probable cause that criminal evidence could be found as a result of the search pursuant to the warrant. *Illinois v. Gates*, 462 U.S. at 238-39, 103 S.Ct. at 2332-33. In this case, the warrant was issued upon the affidavit of an experienced police officer who witnessed activity which was consistent with drug transactions at appellant's home. Although that affidavit failed to specify the date on which these transactions occurred, it was corroborated by another officer whose affidavit did contain the relevant date. When an affidavit in support of a search warrant does not contain the date of the activities therein alleged, but is factually related to other information before the magistrate which does contain the date, it is permissible to draw the inference that the events took place in close proximity to the date given. *United States v. Salvucci*, 599 F.2d 1094, 1096 (1st Cir. 1979); *United States v. Holliday*, 474 F.2d 320, 322 (10th Cir. 1973). Furthermore, the magistrate examined both affiants personally. Finally, we do not question the district court's assessment of the veracity of the police officers. Therefore, we conclude the district court acted properly in upholding the validity of the search warrant of appellant's apartment and the evidence seized pursuant to that search.

Consecutive Sentences

Appellant was convicted, *inter alia*, of two violations of 21 U.S.C. § 841(a)(1) (1984) (amended 1986) which makes it a crime

for any person to possess with intent to distribute "a controlled substance." He was sentenced pursuant to § 841(b)(1)(B) which mandates imprisonment of not more than fifteen years "[i]n the case of a controlled substance in schedule I or II. . . ." Heroin is a schedule I drug while cocaine is a schedule II drug. The district court imposed the maximum sentence of fifteen years for each violation, the terms to run consecutively.

Appellant contends the district court erred by not treating these violations as a single offense. He argues that since the heroin and cocaine were found in one bag at the same time and place, the drugs together constituted a single "controlled substance" as that term was used by Congress in the statute. Alternatively, appellant argues the imposition of consecutive maximum sentences for the two violations constituted cruel and unusual punishment in violation of the eighth amendment of the Constitution.

[9] Congress may authorize the imposition of cumulative punishments for separate criminal offenses occurring in the same act. *Albernaz v. United States*, 450 U.S. 333, 344, 101 S.Ct. 1137, 1145, 67 L.Ed.2d 275 (1981). The double jeopardy clause is not implicated so long as each statutory violation requires proof of an element or fact which the other does not. *Brown v. Ohio*, 432 U.S. 161, 168, 97 S.Ct. 2221, 2226, 53 L.Ed.2d 187 (1977); *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). Otherwise, the critical inquiry for the trial court is whether Congress intended to punish each statutory violation separately. *Jeffers v. United States*, 432 U.S. 137, 155, 97 S.Ct. 2207, 2218, 53 L.Ed.2d 168 (1977).

[10] It is clear that each of the two violations in question here requires proof of an independent fact; *i.e.* the identity of the drugs themselves. The second, fourth, fifth, and sixth circuits have all concluded that, under these circumstances, Congress intended simultaneous possession of different controlled substances to be separate offenses under 21 U.S.C. § 841(a)(1). *See United States v. De Jesus*, 806 F.2d 31, 35-37 (2d Cir.1986) (upholding consecutive sentences under § 841(a)(1) for possession

of cocaine and heroin with intent to distribute), *cert. denied*, ____ U.S. ____, 107 S.Ct. 1299, 94 L.Ed.2d 155 (1987); *United States v. Grandison*, 783 F.2d 1152, 1155-56 (4th Cir.) (same), *cert. denied*, ____ U.S. ____, 107 S.Ct. 160, 93 L.Ed.2d 99 (1986); *United States v. Davis*, 656 F.2d 153 (5th Cir.1982) (upholding consecutive sentences under § 841(a)(1) for possession of quaaludes and marijuana with intent to distribute); *United States v. Pope*, 561 F.2d 663, 669 (6th Cir. 1977) (reversing conviction on other grounds but finding that possession of heroin, a schedule I controlled substance, and possession of methadone, a schedule II controlled substance, are separate offenses under § 841(a)(1)). We believe these holdings are consistent with the plain meaning of § 841(a)(1) which creates a violation for possession of "a controlled substance," not for "a controlled substance or group of controlled substances." We also agree that this reading of the statute is most consistent with Congress' expressed intent to "give maximum flexibility to judges, permitting them to tailor the period of imprisonment, as well as the fine, to the circumstances involved in the individual case." *Davis*, 656 F.2d at 159 (quoting H.R. Rep. No. 91-1444, 91st Cong., 2d Sess., *reprinted in* [1970] U.S.Code Cong. & Admin. News 4566, 4567). We therefore hold that the imposition of consecutive sentences for the simultaneous possession of a Schedule I and a Schedule II drug with intent to distribute is neither barred by the double jeopardy clause nor inconsistent with congressional intent in enacting section 841(a)(1).

[11] Finally, appellant's contention that consecutive maximum sentences for the § 841(a)(1) violations constitute cruel and unusual punishment is without merit. There is no evidence in the record that the trial judge employed improper assumptions, mechanically imposed sentence or refused to exercise his discretion to individualize the sentence. *Cf. United States v. Lopez-Gonzalez*, 688 F.2d 1275 (9th Cir. 1982); *United States v. Wardlaw*, 576 F.2d 932 (1st Cir.1978) We agree that, on the record before us, a thirty year sentence for possession of less than one-half pound of narcotics may appear harsh. As Justice Sutherland wrote:

> Under the circumstances, so far as disclosed, it is true that the imposition of the full penalty of fine and imprisonment upon each count seems unduly severe; but there may have been other facts and circumstances before the trial court properly influencing the extent of punishment. In any event, the matter was one for that court, with whose judgment there is no warrant for interference on our part.

Blockburger, 284 U.S. at 305, 52 S.Ct. at 182. Therefore, since the sentence imposed is not grossly disproportionate to the crimes committed and is within statutory limits, the district court neither abused its discretion nor subjected appellant to cruel and unusual punishment.

Affirmed.

No. 87-1052.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

FELIPE BONILLA ROMERO,
a/k/a "FELO BONILLA,"

Defendant, Appellant.

Before

CAMPBELL, *Chief Judge*,
COFFIN, BOWNES, BREYER, TORRUELLA and SELYA,
Circuit Judges.

ORDER OF COURT

Entered: February 17, 1988

The panel of judges that rendered the decision in this case, having voted to deny the petition for rehearing submitted by the appellant and suggestion for the holding of a rehearing en banc, having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be hereby denied.

By the Court:

Francis P. Scigliano
Clerk.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution:

(A) **Article IV §3, cl. 2**
"...The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

(B) **Amendment IV**
"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(C) **Amendment V**
"...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;..."

(D) **Amendment VI**
"In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

(E) **Amendment VIII**
"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Federal Controlled Substances Act

Title 21 U.S.C. Chapter 13
(Amended 1984)

§ 802. Definitions

As used in this subchapter:

(17) The term "narcotic drug" means any of the following whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(A) Opium, opiates, derivatives of opium and opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation. Such term does not include the isoquinoline alkaloids of opium.

(B) Poppy straw and concentrate of poppy straw.

(C) Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed.

(D) Cocaine, its salts, optical and geometric isomers, and salts of isomers.

(E) Ecgonine, its derivatives, their salts, isomers, and salts of isomers.

(F) Any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subparagraphs (A) through (E).

§ 812. Schedules of controlled substances

Establishment

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after October 27, 1970 and shall be updated and republished on an annual basis thereafter.

Placement on schedules; findings required

(b) Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on October 27, 1970, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substances. The findings required for each of the schedules are as follows:

(1) Schedule I.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

(2) Schedule II.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

(3) **Schedule III.**—

(A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

(4) **Schedule IV.**—

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.

(5) **Schedule V.**—

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV.

§ 841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 or 845a of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a controlled substance in schedule I or II which is a mixture or substance containing a detectable amount of a narcotic drug other than a narcotic drug consisting of—

(I) coca leaves;

(II) a compound, manufacture, salt, derivative, or preparation of coca leaves; or

(III) a substance chemically identical thereto;

(ii) a kilogram or more of any other controlled substance in schedule I or II which is a narcotic drug;

(iii) 500 grams or more of phencyclidine (PCP); or

(iv) 5 grams or more of lysergic acid diethylamide (LSD);

such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $250,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 40 years, a fine of not more than $500,000, or both.

(B) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A) and (C), such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $125,000. or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $250,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(C) In the case of less than 50 kilograms of marihuana, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $50,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for

a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $100,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $10,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become

final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $20,000, or both.

(4) Notwithstanding paragraph 1(C) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 844 of this title.

(5) Notwithstanding paragraph (1), any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be fined not more than—

(A) $500,000 if such person is an individual; and

(B) $1,000,000 if such person is not an individual.

Special parole term

(c) A special parole term imposed under this section or section 845, 845a of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845, 845a[2] of this title shall be in addition to, and not in lieu of any other parole provided for by law.

Pub. L. 600, 64 Stat. 320 (1950)

AN ACT

To provide for the organization of a constitutional government by the people of Puerto Rico.

Whereas the Congress of the United States by a series of enactments has progressively recognized the right of self-government of the people of Puerto Rico; and

Whereas under the terms of these congressional enactments an increasingly large measure of self-government has been achieved: Therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, fully recognizing the principle of government by consent, this Act is now adopted in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption.

SEC. 2. This Act shall be submitted to the qualified voters of Puerto Rico for acceptance or rejection through an island-wide referendum to be held in accordance with the laws of Puerto Rico. Upon the approval of this Act, by a majority of the voters participating in such referendum, the Legislature of Puerto Rico is authorized to call a constitutional convention to draft a constitution for the said island of Puerto Rico. The said constitution shall provide a republicant form of government and shall include a bill of rights.

SEC. 3. Upon adoption of the constitution by the people of Puerto Rico, the President of the United States is authorized to transmit such constitution to the Congress of the United States if he finds that such constitution conforms with the applicable provisions of this Act and of the Constitution of the United States.

Upon approval by the Congress the constitution shall become effective in accordance with its terms.

Sec. 4. Except as provided in section 5 of this Act, the Act entitled "An Act to provide a civil government for Porto Rico, and for other purposes", approved March 2, 1917, as amended, is hereby continued in force and effect and may hereafter be cited as the "Puerto Rican Federal Relations Act".

SEC. 5. At such time as the constitution of Puerto Rico becomes effective, the following provisions of such Act of March 2, 1917, as amended, shall be deemed repealed:

(1) Section 2, except the paragraph added thereto by Public Law 362, Eightieth Congress, first session, approved August 5, 1947.

(2) Sections 4, 12, 12a, 13, 14, 15, 16, 17, 18, 18a, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 39, 40, 49, 49b, 50, 51, 52, 53, 56, and 57.

(3) The last paragraph in section 37.

(4) Section 38, except the second paragraph thereof which begins with the words "The Interstate Commerce Act" and ends with the words "shall not apply in Puerto Rico".

SEC. 6. All laws or parts of laws inconsistent with this Act are hereby repealed.

Approved July 3, 1950.

Controlled Substances Act Of Puerto Rico

Title 24 L.P.R. § 2102. Definitions

The following words and phrases shall have the following meanings unless otherwise indicated in the text of this chapter:

(17) The term "narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(A) opium, coca leaves, and opiates;

(B) a compound, product, salt, derivative, or preparation of opium, coca leaves, or opiates;

(C) a substance, and any compound, product, salt, derivative, or preparation thereof, which is chemically identical with any of the substances referred to in clause (A) and (B) of this subsection, except that the words "narcotic drugs" as used hereunder

does not include decocainized coca leaves or extracts of coca leaves, which extracts do not contain cocaine or ecgonine.

Title 24 L.P.R. § 2202. Schedules of controlled substances

(a) There are established five schedules of controlled substances, to be known as Schedules I, II, III, IV and V. Such schedules shall initially consist of the substances listed in this section and any other substances included or transferred between schedules, pursuant to the provisions hereof. During the month of December of every calendar year, the Secretary shall publish for three (3) consecutive days in two (2) newspapers of general circulation in the island, a list of any changes made to the schedules during said year. In the event no changes are made, the Secretary shall not be bound to publish the same.

(b) The findings required for each schedule are as follows:

(1) Schedule I.–

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in the United States.

(C) There is a lack of accepted safety for use of the drug under medical supervision.

(2) Schedule II.–

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in the United States or a currently accepted medical use with severe restrictions.

(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

(3) Schedule III.–

(A) The drug or other substance has a potential for abuse less than the drugs or other substances in Schedules I and II.

(B) The drug or other substance has a currently accepted medical use in the United States.

(C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

(4) Schedule IV.–

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in Schedule III.

(B) The drug or other substance has a currently accepted medical use in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in Schedule III.

(5) Schedule V.–

(A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in Schedule IV.

(B) The drug or other substance has a currently accepted medical use in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in Schedule IV.

Title 24 L.P.R. § 2401. Prohibited acts (A); penalties

(a) Except as authorized by this chapter, it shall be unlawful for any person knowingly or intentionally:

(1) To manufacture, distribute, or dispense, transport or conceal, or possess with intent to manufacture, distribute, dispense, transport or conceal a controlled substance;

(2) To produce, distribute, or dispense, transport or conceal, or possess with the intent to distribute or dispense, transport or conceal an adulterated substance.

(b) Except as otherwise provided in section 2405 of this title, any person who violates subsection (a) of this section shall, upon conviction thereof, be punished as follows:

(1) (A) In the case of a controlled substance in Schedule I or II which is a narcotic drug, such person shall be guilty of a felony, and, upon conviction thereof, shall be sentenced to imprisonment for a fixed term of twenty (20) years. Should there be aggravating circumstances, the fixed penalty established may be increased to a maximum of thirty (30) years; should there be extenuating circumstances, it may be reduced to a minimum of ten (10) years.

The court, in its discretion, in addition to imprisonment, may impose a fine not to exceed twenty-five thousand (25,000) dollars.

If any person commits such a violation, after one or more previous convictions for an offense punishable under this clause or for a felony under any other provision of this chapter or any law of the United States related to a narcotic drug, marihuana, or depressant or stimulant substances, are final, such person shall be guilty of a felony, and, upon conviction thereof, shall be sentenced to imprisonment for a fixed term of thirty-five (35) years. Should there be aggravating circumstances, the fixed penalty established may be increased to a maximum of fifty (50) years; if there should be extenuating circumstances, it may be reduced to a minimum of twenty (20) years.

The court, in its discretion, in addition to the penalty of imprisonment, may impose a fine not to exceed fifty thousand (50,000) dollars.

(B) In the case of a controlled substance in Schedule I which is not a narcotic drug, such person shall be guilty of a felony, and, upon conviction, shall be sentenced to imprisonment for a fixed term of twelve (12) years. Should there be aggravating circumstances, the fixed penalty established may be increased to a maximum of twenty (20) years; if there should be extenuating circumstances, it may be reduced to a minimum of five (5) years.

The court, in its discretion, in addition to the penalty of imprisonment, may impose a fine not to exceed twenty thousand (20,000) dollars.

If any person commits such a violation after one or more previous convictions for an offense punishable under this clause, or for a felony under the provisions of this chapter or any law of the United States, related to narcotic drugs, marihuana, or depressant or stimulant substances, are final, such person shall be guilty of a felony, and upon conviction thereof, shall be sentenced to imprisonment for a fixed term of twenty-five (25) years. Should there be aggravating circumstances, the fixed penalty established may be increased to a maximum of forty (40) years; if there should be extenuating circumstances, it may be reduced to a minimum of ten (10) years.

The court, in its discretion, in addition to the penalty of imprisonment, may impose a fine not to exceed thirty thousand (30,000) dollars.

(2)

Supreme Court, U.S.
FILED
JUL 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1717

In the Supreme Court of the United States

OCTOBER TERM, 1988

FELIPE BONILLA ROMERO,
A/K/A FELO BONILLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause barred petitioner's trial in federal court after a local Puerto Rico court granted his motions to suppress evidence in a local prosecution.

2. Whether, under the doctrine of collateral estoppel, the decision of a local Puerto Rico court to suppress evidence in a local prosecution should bar the government from seeking to have the evidence admitted in a federal prosecution.

3. Whether separate sentences may be imposed for the simultaneous possession of two different controlled substances, in violation of 21 U.S.C. 841(a)(1).

4. Whether the district court abused its discretion during the suppression hearing by (a) denying petitioner's requests for a continuance, and (b) placing on petitioner the initial burden of producing evidence.

5. Whether the sentences imposed on petitioner constituted cruel and unusual punishment.

6. Whether the district court properly denied petitioner's motion to suppress evidence.

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No. 87-1717

FELIPE BONILLA ROMERO,
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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A12-A25) is reported at 836 F.2d 39. The opinion of the district court (Pet. App. A1-A11) is reported at 639 F. Supp. 1021.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1987. A petition for rehearing was denied on February 17, 1988 (Pet. App. A26). The petition for a writ of certiorari was filed on April 18, 1988 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the District of Puerto Rico, petitioner was convicted of possession of cocaine with intent to distribute it (Count 1) and possession of heroin with intent to distribute it (Count 2), both in violation of 21 U.S.C. 841(a)(1). He was also convicted on two counts of receiving firearms shipped in interstate commerce after having been convicted of a felony (Counts 3 and 5), in violation of 18 U.S.C. 922(h)(1). Petitioner was sentenced to consecutive terms of 15 years' imprisonment on Counts 1 and 2, to be followed by a five-year special parole term, and concurrent terms of five years' imprisonment on Counts 3 and 5. The district court also imposed a total of $100,000 in fines on Counts 1 and 2.

1. On September 18, 1985, Officer Caín Santiago of the Puerto Rico police department observed signs of two drug transactions while he was conducting surveillance of petitioner's residence from a van parked nearby. At 9:30 a.m., an automobile pulled up to petitioner's house, and the driver got out and went inside. About five minutes later, the driver emerged carrying a clear plastic bag that contained a white powder. After holding the bag up and examining it in the sunlight, the driver returned to his automobile and departed.

An hour later, another automobile arrived. The driver got out, walked up to petitioner's house, and called out to him. Petitioner then came out and handed the driver a clear plastic bag containing a white powder. After giving petitioner some money, the driver returned to his automobile and drove away. As the automobile was leaving, Officer Santiago noted its license plate number and reported it to police headquarters. Shortly afterward, Of-

ficer Santiago was informed that the automobile had been reported stolen.

After the second transaction, Officer Santiago returned to headquarters to report his observations to his supervisor. Another officer, Angel Negrón, then drove Officer Santiago back to petitioner's residence. When they arrived there, Officer Negrón locked Santiago in the van and left the area on foot. Officer Santiago resumed the surveillance.

At approximately 1:35 p.m., petitioner came out of his house with a black pistol tucked in the left side of his waistband. When petitioner reached his automobile, he pulled the pistol from his waistband, got into the automobile, and drove away. Officer Santiago relayed by radio the license plate number of petitioner's automobile to Officer Negrón, and he told Officer Negrón to arrest petitioner (whom Officer Santiago knew to be a convicted felon) because he was carrying a gun.

When he received the radio message, Officer Negrón was in a police car with three other officers looking for the stolen car that Officer Santiago had seen at petitioner's house earlier that morning. Officer Negrón and the other officers located petitioner at a nearby gas station, where they arrested him. During the ensuing search, the officers found two clear plastic bags of white powder in petitioner's possession, and they found the pistol inside a clutch purse between the two front seats of the automobile. Later that day, petitioner was charged with violations of the local narcotics and weapons laws. After his arraignment, petitioner was released on bail.

The following day, Officers Santiago and Negrón submitted affidavits to a local judge and obtained a search warrant for petitioner's residence. The officers executed the warrant later that evening. Petitioner was seated on the

sofa with his wife as the officers entered and, when petitioner stood up, the officers observed a brown bag partially hidden behind his wife. The officers seized the bag, which contained 136.87 grams of cocaine, 74.76 grams of heroin, drug-related paraphernalia, and a Colt .45 pistol with a loaded magazine. Petitioner was again arrested, and he was charged with additional violations of the local narcotics and weapons laws.

2. In the course of the local prosecution, petitioner moved to suppress the evidence seized during his arrest at the gas station and during the execution of the search warrant for his house. After an evidentiary hearing, the Superior Court of Puerto Rico expressed serious doubts about the veracity of the officers whose testimony was presented to support the warrantless search of petitioner's automobile and whose affidavits provided the basis for the issuance of the warrant to search his house. The superior court granted the motions to suppress and issued its opinion and order on May 13, 1986. The local prosecution was then dismissed.

In the meantime, petitioner was indicted by the federal grand jury in Puerto Rico on February 19, 1986. Six days before the scheduled trial date, petitioner moved for suppression of the evidence and for a continuance. On May 12, 1986, the district court granted a continuance of the trial and scheduled an evidentiary hearing on the motions to suppress for the next day. The district court, however, denied petitioner's request for a continuance of the suppression hearing until the local court filed its decision and a transcript of the proceedings in that court was prepared. During the suppression hearing, petitioner requested another overnight continuance to produce additional witnesses, and the district court denied that request. Following the evidentiary hearing, the district court denied

petitioner's motions to suppress the Beretta pistol that was seized during his arrest and the narcotics and Colt .45 pistol that were seized during the search of his house. Pet. App. A1-A11.

3. The court of appeals affirmed (Pet. App. A12-A25). The court first rejected petitioner's claim that the Double Jeopardy Clause barred the federal prosecution after the Superior Court of Puerto Rico granted his motions to suppress and dismissed the local prosecution (*id.* at A14-A15). The court concluded (*id.* at A15) that petitioner was not placed twice in jeopardy for the simple reason that jeopardy did not attach at the pretrial suppression hearing in the local court. The court also rejected petitioner's argument that the principle of collateral estoppel precluded relitigation of the suppression issue as a matter of due process (*id.* at A16-A19). Without deciding whether collateral estoppel generally applies in the absence of the attachment of jeopardy, the court held that collateral estoppel did not apply "under the facts of this case [because] Puerto Rico and federal law enforcement officials were not in privity during the local pretrial suppression hearing" (*id.* at A19).

On the merits of petitioner's claim that the evidence against him should have been suppressed, the court of appeals upheld the district court's denial of the motions to suppress (Pet. App. A21-A22). The court of appeals also held that the district court did not abuse its discretion when it denied petitioner's requests for a continuance of the suppression hearing (*id.* at A19-A20).

Finally, the court of appeals upheld the consecutive sentences imposed by the district court on Counts 1 and 2 (Pet. App. A22-A25). The court rejected petitioner's argument that his possession of the heroin and the cocaine constituted only one offense because both controlled substances were found in the same bag during the search

of his house (*id.* at A22-A23). The court noted (*id.* at A23) that heroin is a Schedule I drug whereas cocaine is a Schedule II drug, and it held (*id.* at A24) that "the imposition of consecutive sentences for the simultaneous possession of a Schedule I and a Schedule II drug with intent to distribute is neither barred by the double jeopardy clause nor inconsistent with congressional intent in enacting section 841(a)(1)." The court also rejected petitioner's claim that the consecutive maximum sentences on Counts 1 and 2 constituted cruel and unusual punishment (Pet. App. A24-A25).

ARGUMENT

1. Petitioner first renews his contention (Pet. 11-19) that the Double Jeopardy Clause barred his federal prosecution after the Superior Court of Puerto Rico granted his motions to suppress and dismissed the local prosecution. The protections of the Double Jeopardy Clause, however, "are implicated only when the accused has actually been placed in jeopardy." *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977); see also *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294, 320 (1984) (Brennan, J., concurring in part and concurring in the judgment); *Crist* v. *Bretz*, 437 U.S. 28, 32-33 (1978); *Serfass* v. *United States*, 420 U.S. 377, 388 (1975). Unless jeopardy "attached" at the pretrial suppression hearing in the local prosecution, the Double Jeopardy Clause has no application here.

Petitioner's assertion that jeopardy did attach (Pet. 12-13) is plainly wrong. As the court of appeals observed (Pet. App. A15), jeopardy does not attach in a criminal proceeding until the trial commences. See, *e.g.*, *Crist* v. *Bretz*, 437 U.S. at 37-38 & n.15; *Martin Linen*, 430 U.S. at 569; *Serfass*, 420 U.S. at 388. Indeed, this Court em-

phasized in *Serfass,* 420 U.S. at 391-392, that "[w]ithout risk of determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy." Accordingly, since petitioner was never brought to trial before the Superior Court of Puerto Rico, the court of appeals correctly concluded that his federal prosecution was not barred by the Double Jeopardy Clause.

Petitioner's reliance (Pet. 13) on *Smalis* v. *Pennsylvania,* 476 U.S. 140 (1986), is misplaced. *Smalis* involved a midtrial ruling, not a pretrial ruling, and there was no doubt that jeopardy had attached. Although petitioner contends that the pretrial dismissal of the local prosecution in this case was the "functional equivalent" of a midtrial dismissal for insufficiency of the evidence and should have the same double jeopardy consequences (Pet. 13), this Court rejected just such an argument in *Serfass,* 420 U.S. at 392 ("Petitioner's second premise, that the disposition of his motion to dismiss the indictment was the 'functional equivalent of an acquittal on the merits,' * * * need not * * * long detain us."). In this case, as in that one, petitioner's argument runs afoul of "the fundamental principle that an accused must suffer jeopardy before he can suffer double jeopardy" (*id.* at 393).[1]

2. Petitioner also contends (Pet. 14-18) that the principle of collateral estoppel barred relitigation of the suppression issues in the district court after the Superior Court of Puerto Rico granted the motions to suppress in the local prosecution. That contention is without merit.

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[1] In any event, under the dual sovereignty doctrine, the United States would have the right to prosecute petitioner even if jeopardy had attached in the local proceedings and Puerto Rico were barred by the Double Jeopardy Clause from further prosecution. See *United States* v. *López Andino,* 831 F.2d 1164, 1168 (1st Cir. 1987), cert. denied, No. 87-6581 (May 31, 1988); Pet. App. A15 n.10.

a. Contrary to petitioner's contention (Pet. 14), it is not at all well settled that the doctrine of collateral estoppel applies in successive criminal prosecutions when jeopardy did not attach in the prior proceeding. In *Ashe* v. *Swenson,* 397 U.S. 436 (1970), this Court concluded that the government can be collaterally estopped from relitigating an issue necessarily determined in a defendant's favor after he was acquitted by a jury on another charge. The Court made clear, however, that its conclusion was based squarely on the Double Jeopardy Clause (397 U.S. at 445). To be sure, the Second Circuit has suggested that collateral estoppel may also apply as a matter of due process to prohibit the government from relitigating a pretrial suppression order in a criminal case. See *United States ex rel. DiGiangiemo* v. *Regan,* 528 F.2d 1262, 1265-1267 (2d Cir. 1975), cert. denied, 426 U.S. 950 (1976). But, as the court of appeals noted (Pet. App. A16 n.11), the other courts of appeals that have considered that suggestion have refused to express either their approval or their disapproval of it.

In any event, the court of appeals expressly refrained from deciding that issue in this case (Pet. App. A17). Instead, the court assumed that the principles of collateral estoppel applied, but held that the federal prosecutors were not collaterally estopped from relitigating the suppression issues on the facts of this case because there was no privity between them and the local prosecutors (*id.* at A19). As the court explained, there was nothing to suggest that "federal prosecutors were, or should have been, involved in any way in the local prosecution" (*id.* at A18). The court also observed that the local suppression hearing "concerned purely local charges over which the federal enforcement officials had no authority and thus no interest" (*ibid.*). The court accordingly saw "no reason why the

principles of fairness, justice, and judicial economy embodied in the doctrine of collateral estoppel require that this doctrine be expanded to bind a party so remote from the action decided" (*id.* at A18-A19).

Petitioner argues that the principles of collateral estoppel necessarily applied because Puerto Rico is a coordinate federal jurisdiction for purposes of the dual sovereignty doctrine. That argument is wrong for two reasons. First, Puerto Rico is a separate sovereign for purposes of the dual sovereignty doctrine (see note 1, *supra*). Second, even if Puerto Rico were a coordinate federal jurisdiction for purposes of that doctrine, it would not follow that the federal prosecutors in this case were collaterally estopped from relitigating issues resolved in Puerto Rico proceedings with which they had no connection. The dual sovereignty doctrine is an interpretation of the Double Jeopardy Clause to allow separate sovereigns to bring successive prosecutions for conduct that violates each sovereign's laws. See, *e.g.*, *Heath* v. *Alabama*, 474 U.S. 82, 87-91 (1985). The Double Jeopardy Clause, however, was not implicated here because jeopardy did not attach at the local suppression hearing; the issue was simply whether the principle of collateral estoppel should be applied as a matter of due process. As the court of appeals explained (Pet. App. A17-A18), the source of authority of two government entities is relevant but not dispositive in that context. When, as in this case, the two prosecutions were brought by different prosecuting entities and involved violations of the criminal statutes of separate legal systems, it is appropriate to deny collateral estoppel effect to the local court's suppression order, even if the governments of Puerto Rico and the United States were not considered "separate sovereigns" for purposes of the Double Jeopardy Clause. Cf. *Davis* v. *Eide*, 439 F.2d 1077, 1078 (9th Cir.), cert. denied, 404 U.S. 843 (1971).

b. Petitioner's related contention that the district court should not have conducted its own suppression hearing (Pet. 18-19) is likewise without merit. It is well settled that the admissibility of evidence in a federal criminal prosecution is a question of federal law, not state law, and that evidence may be admitted at trial if a search was valid under federal law, regardless of its legality under state law. *Elkins* v. *United States,* 364 U.S. 206, 224 (1960); see also *Preston* v. *United States,* 376 U.S. 364, 366 (1964); *On Lee* v. *United States,* 343 U.S. 747, 754-755 (1952).

Petitioner argues, however, that a federal court should not conduct a separate evidentiary hearing when a state court decides to suppress evidence based on a factual finding (Pet. 18). There is simply no basis for that argument, and petitioner cites none. Rather, as the Court observed in *Elkins,* 364 U.S. at 223-224:

> In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed.

The federal court's obligation to make its own determination of the legality of a search extends to factual and legal determinations alike.

3. Petitioner next contends (Pet. 19-25) that his consecutive sentences for posssession of both cocaine (Count 1) and heroin (Count 2) with intent to distribute them, in violation of 21 U.S.C. 841(a)(1), constituted multiple punishment prohibited by the Double Jeopardy Clause. In his view, the simultaneous possession of both heroin and

cocaine in one bag constituted possession of a single "controlled substance" under Section 841(a)(1) for which only one sentence could be imposed. That contention has been rejected by every court that has addressed it. See *United States* v. *DeJesus,* 806 F.2d 31, 35-37 (2d Cir. 1986), cert. denied, 479 U.S. 1090 (1987); *United States* v. *Grandison,* 783 F.2d 1152, 1155-1156 (4th Cir.), cert. denied, 479 U.S. 845 (1986); *United States* v. *Davis,* 656 F.2d 153 (5th Cir. 1981), cert. denied, 456 U.S. 930 (1982); see also *United States* v. *Pope,* 561 F.2d 663, 669 (6th Cir. 1977).

The permissibility under the Double Jeopardy Clause of cumulative punishment for particular conduct is a matter of legislative intent. See *Ohio* v. *Johnson,* 467 U.S. 493, 499 & n.8 (1984); *Missouri* v. *Hunter,* 459 U.S. 359, 366, 368 (1983); *Whalen* v. *United States,* 445 U.S. 684, 691-693 (1980). This Court "has consistently relied on the test of statutory construction stated in *Blockburger* v. *United States,* 284 U.S. 299, 304 (1932), to determine whether Congress intended the same conduct to be punishable under two criminal provisions." *Ball* v. *United States,* 470 U.S. 856, 861 (1985). In the absence of a clear expression of legislative intent to the contrary, consecutive sentences are appropriate under *Blockburger* if each statutory provision requires proof of at least one fact not required by the other. *Albernaz* v. *United States,* 450 U.S. 333, 340 (1981).

In this case, the court of appeals applied the *Blockburger* test and concluded that separate sentences for each violation of Section 841(a)(1) were authorized because each violation "requires proof of an independent fact; *i.e.,* the identity of the drugs themselves" (Pet. App. A23). The court also observed that that conclusion was "consistent with the plain meaning of § 841(a)(1) which creates a violation for possession of 'a controlled

substance,' not for 'a controlled substance or group of controlled substances' " (*id.* at A24). The court further found (*ibid.*) that the plain meaning of the statute was consistent with Congress's intent. The Second and Fourth Circuits have used the same approach to reach the same conclusion. *United States* v. *DeJesus, supra; United States* v. *Grandison, supra.*

Petitioner's reliance on *United States* v. *Davis, supra,* as reflecting a conflicting view is unavailing. To be sure, the Fifth Circuit in *Davis* declined to apply the *Blockburger* test in this context, reasoning that the simultaneous possession of two different controlled substances involves two offenses under a single statutory section, as opposed to a single act violating two statutory provisions (656 F.2d at 156-157). Relying on *Bell* v. *United States,* 349 U.S. 81 (1955), the Fifth Circuit believed that the appropriate inquiry was whether Congress intended to treat the simultaneous possession of different controlled substances as one act or multiple acts (656 F.2d at 157-158). After reviewing the legislative history, the Fifth Circuit concluded that consecutive sentences were permissible because "[w]hen Congress set penalties for possession of 'a controlled substance,' it intended to permit trial courts to penalize possession of 'each' controlled substance" (*id.* at 159). Consequently, it is clear that, even though it would reach the result by a different route, the Fifth Circuit would agree with the court below that petitioner was subject to cumulative punishment for his simultaneous possession of both heroin and cocaine.

The ultimate issue of the legality of consecutive sentences in a particular case turns on whether Congress intended to permit multiple punishments, regardless whether the *Blockburger* test or the *Bell* test applies. See *Garrett* v. *United States,* 471 U.S. 773, 779 (1985); *Bell* v. *United States,* 349 U.S. at 82-83. Here, the courts of ap-

peals agree that Congress has manifested its intention to authorize separate and cumulative punishments under Section 841(a)(1) for the possession of different controlled substances at the same time. Although petitioner disputes that conclusion about Congress's intent (Pet. 24), he points out nothing in the legislative history that shows that Congress intended to permit only a single sentence for the simultaneous possession of different controlled substances. Since the courts of appeals have uniformly reached the opposite conclusion, petitioner's contention does not warrant further review.

4. Petitioner further contends (Pet. 25-27) that he was deprived of a fair trial during the evidentiary hearing on the motions to suppress. Specifically, petitioner complains that the district court abused its discretion in denying his two requests for a continuance and improperly placed on him the burden of going forward to show that the searches and seizures were illegal. The court of appeals correctly rejected those contentions.

It is well settled that a trial court has broad discretion to grant or deny continuances. See, *e.g.*, *Morris* v. *Slappy*, 461 U.S. 1, 11 (1983); *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940). In this case, the court of appeals noted that petitioner had "ample opportunity" to obtain a transcript of the suppression hearing in the Superior Court of Puerto Rico and to line up his witnesses before the suppression hearing began (Pet. App. A19). Moreover, the court observed that petitioner's first request for a continuance was based "on the incorrect belief that the district court would be constrained by the Superior Court's decision due to principles of double jeopardy or collateral estoppel" (*id.* at A20). The court also stated that petitioner "never clearly asserted his need of the transcript for impeachment purposes, which he nonetheless could have obtained prior to the hearing and without a continuance"

(*ibid.*). In any event, as the court of appeals emphasized, "the district court waited until after it had received the Superior Court's opinion on that court's decision to suppress the evidence before it rendered its own opinion on the matter" (*ibid.*). And the court of appeals determined that petitioner was not entitled to an overnight continuance, because he "had ample time to prepare for [the] hearing, no new issues were raised there, and yet he failed to subpoena a single witness" (*ibid.*). Those fact-bound conclusions do not warrant further review.

The court of appeals also correctly rejected petitioner's claim (Pet. 27-28) that the district court improperly placed on him the burden of going forward on the motion to suppress. As the court of appeals concluded (Pet. App. A20-A21), petitioner's contention simply "demonstrates a misunderstanding of the difference between burden of production and burden of persuasion." To be sure, the government bears the ultimate burden of persuasion that a warrantless search was lawful. *United States* v. *Jeffers,* 342 U.S. 48, 51 (1951); *McDonald* v. *United States,* 335 U.S. 451, 456 (1948); see also *United States* v. *Longmire,* 761 F.2d 411, 417 (7th Cir. 1985). The party moving to suppress the evidence, however, must first make the initial showing that the search occurred without a warrant and that he had an expectation of privacy in the seized item. See *United States* v. *Bachner,* 706 F.2d 1121, 1125-1126 (11th Cir.), cert. denied, 464 U.S. 896 (1983); *United States* v. *De La Fuente,* 548 F.2d 528, 533-534 (5th Cir.), cert. denied, 434 U.S. 954 (1977); cf. *Rawlings* v. *Kentucky,* 448 U.S. 98, 104 (1980).

5. Petitioner also contends (Pet. 28) that the imposition of consecutive maximum 15-year sentences on Counts 1 and 2 constituted cruel and unusual punishment in viola-

tion of the Eighth Amendment.[2] Petitioner, however, had seven prior felony convictions for drug and weapons violations (Pet. App. A21). The sentence he received was within statutory limits and was considerably less harsh than the sentences that others with shorter criminal records have received for much less serious offenses. See *Hutto* v. *Davis*, 454 U.S. 370 (1982); *Rummel* v. *Estelle*, 445 U.S. 263 (1980); see also *Solem* v. *Helm*, 463 U.S. 277, 290-292 (1983). This Court's decisions upholding those sentences against Eighth Amendment attack preclude any successful Eighth Amendment argument by petitioner.

6. Finally, petitioner contends (Pet. 28-29) that the district court erred in denying his motion to suppress the Beretta pistol seized during his arrest and the Colt .45 pistol and narcotics seized during the search of his house. Those fact-bound contentions do not warrant further review.

a. Petitioner claims that the Beretta pistol should have been suppressed because the arresting officers lacked probable cause to arrest him. The court of appeals correctly concluded, however, that the arresting officers had probable cause to believe that petitioner was committing an offense, based on the information supplied by Officer Santiago, who had observed petitioner enter his automobile with the pistol (Pet. App. A21-A22). Because Officer Santiago was aware that petitioner was a convicted

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[2] Because petitioner's offenses were committed on September 18, 1985, the maximum term of imprisonment for each offense was 15 years. See 21 U.S.C. (Supp. II) 841(b)(1)(B). Congress has recently revised and increased the maximum penalties for violations of Section 841(a) in the Anti-Drug Abuse Act of 1986 (Pub. L. No. 99-570, Tit. I, §§ 1002, 1003(a), 1103, Tit. XV, § 15005, 100 Stat. 3207-2, 3207-5, 3207-11, 3207-192). Under that Act, petitioner would have been subject to a maximum term of imprisonment of 20 years. See 21 U.S.C. (Supp. IV) 841(b)(1)(C).

felon and did not have a license to carry a firearm, he clearly had probable cause to believe that petitioner was committing an offense. See 18 U.S.C. 922(h)(1).[3] And the arresting officers were entitled to rely on Officer Santiago's radio communications to arrest petitioner based on his personal observations. *United States* v. *Hensley,* 469 U.S. 221, 229-233 (1985); cf. *Whiteley* v. *Warden,* 401 U.S. 560, 568 (1971).

b. Petitioner also claims that the Colt .45 pistol and the narcotics should have been suppressed under *Franks* v. *Delaware,* 438 U.S. 154 (1978), because the search warrant for his house was based on false statements by Officer Santiago. That claim ignores the factual findings made and accepted by the courts below. After hearing the testimony of Officers Santiago and Negrón at the evidentiary hearing, the district court found "no reason to discredit affiants' truthfulness concerning the facts" and concluded that "no showing has been made * * * in the sense that false statements were included in the affidavit" (Pet. App. A11). The court of appeals accepted the district court's findings (*id.* at A22), and those findings therefore do not merit this Court's review. See, *e.g.*, *United States* v. *Doe,* 465 U.S. 605, 614 (1984); *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635 (1967).

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[3] Contrary to petitioner's contention (Pet. 29), it was not necessary that the information received by the arresting officers be "totally inconsistent" with innocent behavior in order for them to have probable cause to make the arrest. As this Court has explained, "it is clear that 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.' " *Illinios* v. *Gates,* 462 U.S. 213, 235 (1983) (quoting *Spinelli* v. *United States,* 393 U.S. 410, 419 (1969)).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JULY 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60531